

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 UNITED STATES OF AMERICA,)

5 Plaintiff,)

Case No. 3:18-cr-00475-IM

6 v.)

7 April 13, 2022

8 DONTAE LAMONT HUNT,)

9 Defendant.)

Portland, Oregon

10 MOTION HEARING

11 TRANSCRIPT OF PROCEEDINGS

12 BEFORE THE HONORABLE KARIN J. IMMERGUT

13 UNITED STATES DISTRICT COURT JUDGE

14

15

16

17

18

19

20

21

22

23

24

25

APPEARANCES

FOR THE PLAINTIFF:

PETER D. SAX
United States Attorney's Office
1000 SW Third Street
Suite 600
Portland, OR 97204

FOR THE PLAINTIFF:

GARY Y. SUSSMAN
United States Attorney's Office
1000 SW Third Street
Suite 600
Portland, OR 97204

FOR THE DEFENDANT:

JOHN ROBB
Kevin Sali LLC
1500 SW 1st Avenue
Suite 1020
Portland, OR 97201

FOR THE DEFENDANT:

AMANDA A. THIBEAULT
Alvarez Thibeault LLC
330 NE Lincoln Street
Suite 100
Hillsboro, OR 97124

COURT REPORTER:

Jill L. Jessup, CSR, RMR, RDR, CRR, CRC
United States District Courthouse
1000 SW Third Avenue, Room 301
Portland, OR 97204
(503) 326-8191

* * *

TRANSCRIPT OF PROCEEDINGS

(April 13, 2022)

(In open court:)

THE COURT: Good morning, everyone. Please be seated. If you are fully vaccinated and boosted, you may remove your masks. You're not required to. It's totally up to you.

Why don't I have the Government call the case. Mr. Sax.

MR. SAX: Good morning, Your Honor. Peter Sax and Gary Sussman for the United States. We're here for a motions hearing and status conference in United States v. Dontae Lamont Hunt. Case No. 18-cr-00475. Defendant is present, in custody, being represented by his attorneys, John Robb and Amanda Thibeault.

THE COURT: Mr. Robb.

MR. ROBB: Good morning, Your Honor. John Robb and Amanda Thibeault are here representing Dontae Hunt. We're ready to proceed to argument on the defendant's motion to suppress and on a portion of the defendant's motion to -- motion to compel, and we're ready to proceed in whichever manner that the Court deems fit.

THE COURT: So it seemed to me -- let's start with argument on the motion to suppress, and then we can talk about the portion of the --

Ms. Thibeault?

1 MS. THIBEAULT: I was getting ready to go. Sorry,
2 Judge.

3 THE COURT: So we'll start with the motion to
4 suppress argument, and I had a couple of questions probably for
5 both sides on that, first. And then I'll allow the defense to
6 do the opening argument, if you will, Government response, and
7 then you'll get the last word from the defense, since it's your
8 motion.

9 Then I'll address the portion of the discovery motion
10 regarding discovery from the RICO investigation of Mr. Jones,
11 and then I want to talk a little bit about what's next in the
12 case. I know I have some deadlines for responding to the
13 speedy trial motion; so I did want to get that done with -- or
14 resolved quickly because, obviously, that changes the course of
15 things in the case, but -- so we can talk about that at the
16 end. So I want to deal with housekeeping matters, in terms
17 scheduling, the possibility of a continuance, which I'm still
18 inclined not to grant, but we'll talk about that as -- after we
19 deal with the suppression motion and the Jones case files.

20 So let me first just pose a couple of questions to the
21 Government, which in -- if I'm understanding the argument in
22 your briefing correctly, it looks like the officers or
23 agents -- federal agents and Portland Police Bureau officers --
24 who are working on the drug trafficking investigation at some
25 point discover that the black iPhone that is discarded, left at

1 the scene back at the December 2017 shooting, where Mr. Hunt is
2 the victim, that at some point they discover that that is
3 Mr. Hunt's phone, and it was my impression that that may not be
4 until the officers actually execute the search on it. But I'm
5 not sure about that. I want to see in the record if there's
6 anything that tells me when they discover it's Mr. Hunt's
7 phone. "Does that matter?" is another question. And then in
8 terms of the abandonment argument.

9 And then at what point -- it seems to me that you make the
10 argument that there is not unreasonable delay because probable
11 cause doesn't really ripen for the phone's -- the 2017 phone's
12 connection to Mr. Hunt's drug trafficking allegations because
13 that doesn't happen until numerous searches occur with regard
14 to the drug trafficking investigation, which is unrelated to
15 Mr. Hunt as victim in the shooting. But it seemed to me that
16 would you have had probable cause at the outset? And I think
17 I'm understanding your argument that you wouldn't, really,
18 because you wouldn't have obtained a warrant until a number of
19 things had happened suggesting that the 2017 phone would have
20 information about drug -- was likely to have evidence of drug
21 trafficking from back in 2017.

22 So it's not -- really, I'm asking for clarification on
23 your part about whether we know when the officers discovered it
24 was Mr. Hunt's phone and whether you had probable cause earlier
25 to search that phone for drug trafficking.

1 MR. SUSSMAN: Okay. First, there was no outward
2 indiction at the time the phone was seized who the phone
3 belonged to. I think it's reasonable for the officers in
4 Eugene to assume that it had some connection to the shooting
5 because it was found at the shooting scene amongst spent
6 cartridges, among bullet fragments, among bullet holes, and
7 among blood stains. But there's no outward indication on the
8 phone who the phone belonged to, and nobody laid claim to it
9 for years.

10 Now, could that phone have belonged to Dontae Hunt? It
11 could have. Could it have belonged to the shooter? It could
12 have. Could it have belonged to somebody completely
13 unconnected to this case? Could have. Nobody knew at that
14 point. In fact, nobody knew conclusively who that phone
15 belonged to until they actually searched the contents and were
16 able to attribute it to Mr. Hunt.

17 Now --

18 THE COURT: Does that matter in analyzing whether or
19 not there's unreasonable delay?

20 MR. SUSSMAN: I think it does matter, to a certain
21 extent, because if, for example, they knew for a fact, going
22 into it, that it was Mr. Hunt's phone, then it might be a
23 little bit -- it might make a difference; but when they don't
24 know who the phone belongs to and there's nothing to attribute
25 it to anybody and no one lays claim to it, then it's -- then it

1 presents a different picture, and it presents a different
2 analysis for the Court's reasonableness and diligence analysis.

3 Now, in terms of when they developed probable cause to
4 search the phone and could they have developed probable cause
5 earlier? Well, I don't think they could have. And the reason
6 for that is, is that because the officers were aware -- the
7 agents were aware that Dontae Hunt had been shot, and they were
8 aware of that in connection with their work in the drug
9 investigation. They knew there had been a shooting. They knew
10 Mr. Hunt had been shot. But it wasn't until quite late in the
11 investigation that they discovered that there might actually be
12 some connection between the phones that were seized the night
13 of the shooting and the federal drug investigation, which was
14 completely separate from the shooting investigation, done by
15 completely different agencies, connected with completely
16 different sovereigns. And there just was nothing to link the
17 phones or anything that could be found on the phones to the
18 federal drug investigation until they had served the search
19 warrants at the residences, seized the 10 or 11 cell phones,
20 subsequently got warrants for those phones, got into the
21 phones, found evidence in the phones, and especially the search
22 warrant that occurred in mid- to late-December of 2019, which
23 is when they found text messages evidencing drug trafficking
24 activities that dated back to January 2018, shortly after the
25 shooting, that they had probable cause to believe that there

1 could be evidence on the phones seized the night of the
2 shooting that tied into the federal drug investigation.

3 So that's a long way of saying, no, I don't think they
4 could have developed probable cause before that.

5 THE COURT: So when you make the argument in your
6 briefing that there's really zero delay or any delay which
7 would -- you're not saying it's unreasonable, but any delay as
8 between actually obtaining the search warrant and then the
9 forensic analysis, but that's also accounted for by the
10 magistrate judge in giving you that time to do a forensic
11 analysis.

12 So from the Government's perspective, there is zero
13 delay -- or am I understanding that's your position -- that
14 there's zero delay between the December 2, 2017, shooting of
15 Mr. Hunt and the execution of the search warrant, or is
16 there -- are there periods of --

17 MR. SUSSMAN: It's a little more nuanced than that.
18 I mean, obviously, if we're talking about the time period
19 between December of 2017 and January of 2020, there's a period
20 of time that's elapsed there.

21 The question is going to become as to whom is that time
22 attributable? Is it attributable to federal agents, who had
23 actually no role in the state shooting investigation down in
24 Eugene, or is it attributable solely to the officers involved
25 in the Eugene investigation?

1 The Government's argument about zero delay was that there
2 was, in fact, zero delay between the time the agents obtained
3 the search warrant and the time the agents executed the federal
4 search warrant on those two phones because the warrant was
5 issued on January 9 of 2020 and executed the same day when the
6 agent seized the phone from the Eugene police.

7 There could be some small period of delay between when
8 they determined that they had probable cause and when they
9 actually obtained the warrant, but there we're talking about
10 maybe a matter of a week or maybe a matter of a week and a half
11 between -- I'm not sure the exact date that they got the --
12 that they did their analysis of the forensics from the phone,
13 that -- that they served the search warrant on back in December
14 of 2019. I'm not sure how long it took them between the time
15 they served that search warrant and the time they got the data
16 back, but it's not going to be very much time between then and
17 when they realized they had probable cause and got the warrant
18 for the two Eugene phones and executed it.

19 THE COURT: And because the search warrant that --
20 December 13, 2019, at least according to your briefing, is when
21 officers discovered that there were texts dating back to
22 January of 2018, involving Mr. Hunt and drug trafficking -- or
23 apparent drug trafficking -- and based on that, the officers
24 had probable cause to then search phones that would have been
25 around in December of 2017, and that search warrant was issued

1 on January 9, 2020 -- or they obtained the search warrant
2 January 9, 2020, for the 2017 phone that was on the ground
3 where Mr. Hunt was shot.

4 MR. SUSSMAN: Correct.

5 THE COURT: So there's some period of time, but not
6 particularly long, and the question is --

7 MR. SUSSMAN: Not unreasonably long under the Fourth
8 Amendment.

9 THE COURT: Then let me ask a question of the
10 defense.

11 Ms. Thibeault, I did notice that you include the property
12 receipt in your briefing, and one of the items that I thought
13 was sort of interesting is number 17, which shows that one of
14 the two sets of keys that were discovered at the scene were
15 released to special -- I think it's Office -- Officer Hart to
16 give to an acquaintance of the victim.

17 Doesn't that suggest that the victim or victim's
18 associates knew that police had -- Eugene police had picked up
19 items from the scene and if they wanted to lay claim to them,
20 they could?

21 MS. THIBEAULT: I would say that the fact that the
22 Eugene police released keys to associates of Mr. Hunt and not
23 other items, in fact, raises the defense's argument. Because
24 here we have the Eugene police releasing certain items that
25 they located on scene to associates of Mr. Hunt but not the

1 phone.

2 They never released the phone, obviously, because that's
3 the subject of this motion, to Mr. Hunt or his associates. And
4 the Government has provided zero evidence, nor can they, that
5 Mr. Hunt or his associates were told about the phone.

6 So the fact that the law enforcement agency investigating
7 this crime releases one item located, I would say, to a
8 reasonable person, would indicate that they did not locate any
9 other items on scene that could belong to Mr. Hunt.

10 Because the reality is that at the shooting, between the
11 time the shooting occurred and between the time property was
12 seized, investigated, discovered, anyone could have picked up
13 those items on scene. The assailant who almost murdered
14 Mr. Hunt could have taken his phone. Any of the passing-by
15 witnesses in that apartment complex could have taken his phone.
16 So the fact that the Eugene police provided one item to
17 Mr. Hunt's associates, I would suggest, makes it even less
18 likely that Mr. Hunt would have any idea that the Eugene police
19 seized his phone.

20 And if Your Honor is willing, I would like to address the
21 point that you were talking to the Government about in terms of
22 the timing of probable cause.

23 THE COURT: Sure.

24 MS. THIBEAULT: If that's okay.

25 THE COURT: I assume that's really part of your

1 argument anyway.

2 MS. THIBEAULT: Yes.

3 THE COURT: So why don't you wait. Just sit tight on
4 that because then you'll be able to address all of that in your
5 argument.

6 MS. THIBEAULT: Sure.

7 THE COURT: Although, again, I guess my point, when I
8 look at the property receipt and the fact that an item was laid
9 claim to, isn't it equally plausible that the appropriate
10 inference from that is -- I mean, the police aren't just going
11 to give away stuff to people who don't say, "That's mine," and
12 prove that it's theirs. Right? And here we have two sets of
13 keys, a bunch of stuff that's in a planter, bullet casings,
14 really crime scene evidence, that it makes sense that the
15 police -- Eugene police, investigating the shooting, picked
16 everything up.

17 The question is what should they do with it? Should
18 they -- it looks like somebody -- an acquaintance of Mr. Hunt's
19 must have come and said, "We're going to bring these keys," or
20 they -- somehow that connection to Mr. Hunt was made, but there
21 are other keys that do not appear to have been turned over to
22 anybody. Mr. Hunt had a phone on him in the hospital; so the
23 phone that is seen in the surveillance could have been the one
24 that he had in the hospital. So I'm not sure what would
25 have -- what you think would have alerted the police to somehow

1 give that phone to Mr. -- that they had an obligation to give
2 that phone to Mr. Hunt without anybody coming forward.

3 MS. THIBEAULT: Sure.

4 THE COURT: Is there any legal authority for your
5 position that they had such an obligation?

6 MS. THIBEAULT: Sure. And, first, what I'll note is
7 this evidence receipt doesn't indicate that Mr. Hunt's
8 associates came and laid claim to the keys on scene.

9 What this evidence receipt indicates is that at a certain
10 point law enforcement handed over keys to Mr. Hunt's
11 associates. There's no indication that Mr. Hunt's associates,
12 from that receipt, or Mr. Hunt himself came up to the Eugene
13 Police Department and said, "Hey, can we have our keys back?
14 Can we have this back?" The receipt indicates that the Eugene
15 police made a choice by themselves to release the keys and not
16 anything else.

17 THE COURT: But doesn't common sense tell you that
18 somebody established that those were Mr. Hunt's keys to the
19 police in order for the police to give them over?

20 MS. THIBEAULT: Sure. I would say that's one
21 inference.

22 I would say the other inference is that the police decided
23 what they were going to release from the scene based on the
24 information that they had at the time, and this sort of ties
25 into the timing issue that I know I'll address later.

1 THE COURT: Okay. So, actually, why don't I now let
2 you argue. That was one of the questions that I had raised
3 from -- or that was raised in my mind from reading your
4 briefing, but now you're free to argue anything else you would
5 like to highlight in your briefing. Obviously, I have been
6 able to read what you have submitted, and so you don't need to
7 repeat everything, but I'm happy to have you highlight and
8 argue anything you would like.

9 MS. THIBEAULT: Sure. Thank you, Judge.

10 So the first thing I want to do before I get into my
11 outline is specifically address the questions that you had for
12 the Government and their response in terms of probable cause.
13 And what I want to note is on page 7 of their own response to
14 the defendant's motion to suppress, they lay out the timeline
15 about when they became aware that the phone in the Eugene
16 investigation was something that they were going to want in
17 this federal investigation against Mr. Hunt. And it notes that
18 a warrant executed on a hunt -- on a house they believe to be
19 Mr. Hunt's home on September 27, 2018, under defendant's bed,
20 investigators found a black gun box marked with a make, model,
21 and serial number of one of the guns that Eugene police found
22 in the car with Jones and Thomas after the two women dropped
23 defendant off at the hospital. And then they also found a
24 receipt that they're going to use in this case.

25 So starting back on September 27th of 2018, the Government

1 becomes well aware that the fruits of the Eugene investigation
2 are something they are going to want in their own investigation
3 against Mr. Hunt.

4 And I'll also note the searches of the phones in this case
5 took place on January 14, 2019, and a subsequent search of a
6 flip phone took place on June 17th of 2019.

7 So what I'm going to ask Your Honor to do ultimately is to
8 have the Government establish what date they're talking about
9 here because I'll note in the declarations the exhibits that
10 they filed in support of their motions, they say, "We were
11 aware of the Eugene investigation. We knew the stuff was going
12 on. We believe it connected Mr. Hunt to this case," but for
13 whatever reason, that exhibit very specifically chooses to
14 exclude the specific date that the Government believes that
15 they now want to go seize the phone associated in this case.

16 And their exhibit and their motion specifically excludes
17 the day that they became aware that there were phones that were
18 not searched by the Eugene police, and that's the calculus that
19 we're really going to have to talk about in this case because,
20 per the cases under the Fourth Amendment, every single day,
21 week counts in terms of whether or not the delay in seizing and
22 reviewing this phone under a warrant is reasonable, and so --

23 THE COURT: Don't all the cases that you cite
24 demonstrate that it's not -- the property is not an unknown
25 person's property?

1 MS. THIBEAULT: I take your question to mean don't
2 the cases that I have -- don't the cases that we have cited
3 relate to cases where they specifically know that phone belongs
4 to X person? Am I understanding your --

5 THE COURT: That's a better way to put it.

6 MS. THIBEAULT: Okay. I think your way was better,
7 but at least I got there.

8 So what I'll say is, yes, that's correct. I don't have a
9 case to bring to you, and if I did, I would love to. I don't
10 have a case to bring to you where we have an object that the
11 Government doesn't know who it belongs to.

12 So, you know, that's kind of the thrust of the defense
13 argument here is that it's the Government's burden to establish
14 that the delay is reasonable. And in doing so, they need to
15 specifically establish what delay that was, and their exhibit
16 and their motion don't specifically give that date. And we
17 have a variety of other dates that suggest that they were well
18 aware of the Eugene shooting, the phones not being searched.
19 And in the exhibit, you know, law enforcement specifically
20 says, "I became aware that the phone had not been searched,"
21 but never included the date that he became aware of that fact.

22 THE COURT: But what about what Mr. Sussman clarified
23 for me in terms of the development of the probable cause to
24 believe that the phone contained texts or information, evidence
25 regarding drug trafficking activities by Mr. Hunt in 2017? Do

1 you disagree with -- do you feel there was probable cause for
2 evidence of drug trafficking much earlier than the search was
3 obtained? So that is after December 13, 2019?

4 MS. THIBEAULT: Well, I don't want to -- I don't want
5 to kind of circumvent my argument and say that the Government
6 had probable cause, but what I want to suggest is that the
7 Government has the burden of proof in this case, and the
8 exhibit that they're choosing to rely on, on when they found it
9 reasonable to issue a warrant for the phone, specifically
10 leaves out the critical date, which is what date the Federal
11 Government became aware that there was a phone that had not
12 been searched by the Eugene Police Department and the fact that
13 we don't have that information, and it's the Government's
14 burden to prove that information, I think, is the critical
15 question here because --

16 THE COURT: Are you referring to -- I'm looking at
17 Scott McCollister's affidavit, which is, I think, the evidence
18 of the timeline; right? That's Exhibit ECF 182-2.

19 MS. THIBEAULT: Yes. Specifically, on page 2 --
20 page 2, paragraph 4, "We were aware of the shooting in Eugene,
21 and I included information about it in various warrant
22 affidavits in the federal investigation."

23 So not only was the Federal Government aware of the
24 shooting in Eugene, but they believed that shooting provided
25 them and assisted them in getting probable cause to search

1 other items.

2 So this idea that they can now say, in terms of reaching
3 to get the phone from Eugene, that "These were two totally
4 separate investigations. They didn't have anything to do with
5 each other. We didn't believe the shooting could support
6 evidence of drug trafficking," is just not true because they
7 were using the shooting itself as evidence in the warrants to
8 seek search warrants for other digital devices.

9 So it's unclear to me how the Government, on one hand, can
10 say, "Well, we're going to use this Eugene shooting as probable
11 cause in our drug trafficking investigation," and then say "but
12 we didn't have probable cause. We weren't -- we didn't have
13 any reason to be on notice that this phone was of interest to
14 us," when they were using that shooting throughout the entire
15 time of their investigation.

16 And so what I'll suggest, Judge -- kind of moving into the
17 overview, but --

18 THE COURT: Can you identify for me where in -- okay.
19 So you're looking at, "We were aware of the shooting, and I
20 included the information about it in various warrant affidavits
21 in the federal investigation"; so you're saying that because --
22 which was a drug investigation. So if they were including the
23 shooting in the drug investigation, that they should have been
24 able to search the phone at that time?

25 MS. THIBEAULT: That they would have been on notice

1 that that would have been the time that the phone became of
2 interest to them, if that makes sense.

3 THE COURT: Okay. Yeah. Thank you.

4 MS. THIBEAULT: So, Judge, on December 2, 2017,
5 Mr. Hunt was a crime victim, and he remains one today. Eugene
6 police took two of his phones. One at the hospital, where
7 Mr. Hunt was never told that another phone had been seized from
8 the scene, and when he was told by law enforcement at the
9 hospital that they were going to seize the phone that he had on
10 him at the hospital, he told them he didn't want them to take
11 it. He invoked his rights. He exercised his rights.

12 THE COURT: Let me ask you about that.

13 MS. THIBEAULT: Sure.

14 THE COURT: It seemed to me that -- or the
15 Government's response is, "We didn't -- could never encrypt --
16 get through the encryption on the phone" -- the white iPhone at
17 the hospital -- so they have not obtained nor will they use
18 anything from that search. Is it appropriate for me to -- what
19 outcome should I follow? It seemed to me one outcome is to
20 deny the motion as moot because no evidence is derived from
21 that. And that's the purpose of a search warrant, is to
22 suppress evidence; and if there is no evidence from it, it's
23 moot.

24 MS. THIBEAULT: Sure. And so I -- I would say as to
25 the search of the white iPhone, to the extent that the

1 Government has not been able to obtain evidence from it today,
2 that the motion could be denied as to that phone as moot.

3 THE COURT: Okay.

4 MS. THIBEAULT: If later, of course, technology
5 develops and they're suddenly able to unencrypt it, I would
6 reraise these arguments at that time.

7 THE COURT: Understood.

8 MS. THIBEAULT: But I mention the phone at the
9 hospital and that conversation because the Government relies on
10 that in their own response to our motion to suppress as a
11 reason why Mr. Hunt should have known, should have been aware
12 that the Eugene police seized his phone from the scene, because
13 they cite to that scene in their own response to our motion
14 that, "Look, law enforcement had a conversation with Mr. Hunt.
15 They told him they were seizing one phone. And so, look,
16 Mr. Hunt, as he's lying, bleeding, medicated in a hospital bed,
17 should have been aware that this other phone was probably going
18 to be seized by the Eugene Police Department on scene."

19 Judge, I think this might be an appropriate time, if you
20 are comfortable -- although, I'll play it at your leisure -- we
21 have brought with us an additional exhibit. I think I labeled
22 it Exhibit 4, but I'm happy to call it whatever the Court
23 wants, which is the body camera footage of that conversation
24 that the officer had with Mr. Hunt.

25 THE COURT: All right. Is there any objection to

1 counsel playing that for the Court?

2 MR. SUSSMAN: No, Your Honor. Thank you.

3 THE COURT: All right. Now is fine.

4 MS. THIBEAULT: You'll have to forgive me. I
5 unplugged my computer and dropped the cord.

6 THE COURT: So the court reporter is not going to
7 transcribe during this portion, if that's okay.

8 MS. THIBEAULT: I'm fine with that.

9 MR. SUSSMAN: That's fine, Your Honor. Thank you.

10 I'm sorry. Did you call it Exhibit 4?

11 MS. THIBEAULT: I called it Exhibit 4 because I had
12 labeled my other exhibits in my reply 1, 2, and 3, but I'm
13 happy to call it whatever anybody wants.

14 THE COURT: Let's keep it 4. That makes sense.

15 MS. THIBEAULT: Sure. With opposing counsel's
16 permission, the video is 7 minutes and 45 seconds long. I
17 didn't want to edit it because I didn't want anybody to think I
18 was removing anything, but what I would like to do is just play
19 the most pertinent portion, which is the last bit, if that's
20 okay with everybody.

21 MR. SUSSMAN: Makes sense to us, Your Honor.

22 THE COURT: That's fine.

23 MS. THIBEAULT: So at this moment, I'll be playing
24 Defense Exhibit 4, which should be included as an exhibit in
25 our reply, and I will play it, and then I will move to admit it

1 once I --

2 MR. SUSSMAN: Your Honor, if she's going to play it,
3 it probably should be admitted before it gets played.

4 MS. THIBEAULT: I will move to admit Exhibit No. 4.

5 THE COURT: Any objection?

6 MR. SUSSMAN: No, Your Honor. Thank you.

7 THE COURT: Exhibit 4 will be received.

8 (Exhibit 4 played for the judge beginning at 5:23.)

9 MS. THIBEAULT: Judge, that's Defense Exhibit 4, and
10 I played that because, you know, the central issue that we're
11 talking about -- well, I think there are three main issues that
12 we're talking about here. Number one, whether or not
13 Mr. Hunt's lack -- momentary lack of control of his phone, as
14 he was fleeing being shot at the scene, constitutes
15 abandonment. I think the second issue that we're circling
16 around with abandonment is whether or not Mr. Hunt's failure to
17 seek the return of his phone from the Eugene Police Department
18 is further evidence of that abandonment.

19 And as to that, the Government relies on this very
20 conversation that we just watched in the hospital. And I think
21 it's pretty clear from the video that Mr. Hunt is incredibly
22 injured. He's not doing well. We know a doctor says he's
23 probably -- may need surgery, and we know the only conversation
24 that law enforcement had with Mr. Hunt about objects that they
25 were seizing at the time was the phone that he had on him at

1 the time.

2 And when he was asked to cooperate with that
3 investigation, to waive his privacy interests as to that phone,
4 Mr. Hunt says, no, he's not going to give up his cell phone
5 password, and that's the information that Mr. Hunt was given,
6 that the Government can prove about the objects on the scene at
7 the Eugene shooting.

8 And what we also know from this investigation is that
9 Mr. Hunt was on the phone when he was shot. And so as to the
10 first argument, Judge, I don't -- I don't want to get too far
11 into whether or not Mr. Hunt's dropping the phone at the scene,
12 while he's fleeing being shot, constitutes abandonment.
13 Because, quite honestly, I think the murkier issues are in
14 other places in my motion.

15 But just briefly, I'll note that abandonment needs to be
16 voluntary, and it needs to indicate an intentional
17 relinquishment of somebody's rights.

18 And here we have someone who literally was fleeing being
19 shot and almost being murdered, and so this idea that any kind
20 of momentary lapse of physical control or dropping an object at
21 the scene would constitute voluntary abandonment, I think -- I
22 think short-sights what the Fourth Amendment is really about,
23 which is --

24 THE COURT: But isn't the black phone -- so he has
25 the phone on him.

1 MS. THIBEAULT: In a pocket of his pants.

2 THE COURT: Most people have a single phone, and the
3 other -- the black iPhone is in a planter, which, when you look
4 at -- it's unclear exactly -- so, I mean, although you're
5 saying he dropped it and that somehow that might have been the
6 phone he was on, that's not clear from the video. And the
7 officers -- so their perception, which was, "We couldn't tell
8 what color the phone was that he was talking on when he was
9 shot," and you -- I couldn't see in the video that the phone is
10 dropped, or at least -- I guess I didn't see the full video. I
11 saw the stills that were presented in the pleadings. So if
12 there's a phone in a planter nearby, how do you draw the
13 inference that it's somehow just inadvertently dropped?

14 MS. THIBEAULT: Sure. And what I'll say is that's
15 one plausible inference. Mr. Hunt was being shot. He was on
16 the phone. He was running from the scene. The Government is
17 asking you to draw a different inference, which is that it was
18 purposely left there. And to that point, it's the Government's
19 burden to prove that he voluntarily abandoned it, and they're
20 supposed to prove it by a preponderance of the evidence. And
21 the very fact we're having this discussion, you and I, about
22 what evidence there suggests that he voluntarily abandoned it,
23 and, "Couldn't this be another reasonable inference, and
24 couldn't this be another be reasonable inference?" well, that
25 right there should tell Your Honor that the Government hasn't

1 met its burden and cannot meet its burden in terms of whether
2 or not that phone being left at the scene constitutes voluntary
3 abandonment.

4 I think the -- I think, honestly, the bigger issue that
5 we're dealing with here and that Your Honor has already kind of
6 peppered us with questions about is what obligations does the
7 Government have to kind of -- to put someone on notice about,
8 "Hey, we -- we have your property"?

9 And I think that was Your Honor's most pointed question
10 about, you know, "Aren't these cases that you've cited all
11 about property that they know who it belongs to?" And like I
12 said earlier, I wish I had a different case, but I don't.

13 And so what I think we need to look at in that
14 circumstance, given -- given the unique factual circumstance
15 that we have here, is does Mr. Hunt's failure to seek the phone
16 back constitute abandonment? And I think the first answer to
17 that question is, number one, that is on the Government to
18 prove.

19 And so if the Government has the burden of proving
20 voluntary abandonment, which constitutes an intentional
21 relinquishment of someone's rights, well, the first relevant
22 question would be, "Did Mr. Hunt -- was he ever aware that that
23 phone was taken by the Government?"

24 And we talked a little bit about this earlier with the
25 evidence receipt, and the Government has provided zero evidence

1 that Mr. Hunt was ever put on notice that his phone was taken
2 by the Government.

3 There were tons of people on -- tons is hyperbole.
4 Apologies. There were other people on scene, including the
5 person who shot Mr. Hunt, who could have seized his phone.
6 There were other witnesses on scene who to have seized his
7 phone.

8 And Eugene Police Department, if they thought it could
9 have been Mr. Hunt's phone, could have said, "Hey, we found
10 another phone on scene. Is this yours?" And they didn't. And
11 that failure to do a proper investigation or to attempt to put
12 Mr. Hunt on notice that it -- "Hey, that might be your phone on
13 scene," shouldn't be held against Mr. Hunt. Especially when
14 it's the Government's burden here to prove voluntary
15 abandonment.

16 THE COURT: And is it fair to say, though, there
17 was -- Rylie Jones and then the defendant's girlfriend were
18 both in the same vicinity --

19 MS. THIBEAULT: Yes.

20 THE COURT: -- as Mr. Jones -- excuse me -- as
21 Mr. Hunt?

22 MS. THIBEAULT: Not when he was -- not -- I think
23 "vicinity" might be -- I think maybe I'm having an issue with a
24 word.

25 THE COURT: They come through that area to help him?

1 MS. THIBEAULT: Yes. Yes. That would be a fair
2 statement, Judge, is that Mr. Hunt is shot. He's trying to get
3 away from the scene. Those two women come and try and assist
4 him as he's leaving. That's correct.

5 THE COURT: Your view, Ms. Thibeault, would it be a
6 search if the officers turned on a phone they found to see if
7 they could identify anything on it that would place it with a
8 particular owner?

9 MS. THIBEAULT: I had not thought about that question
10 before you just asked me, but thinking on my feet, what I would
11 say is that, when we're wondering whether or not a search
12 occurs, what we're wondering is whether or not the Government
13 or Government entity is examining an object more than they
14 would be able to with a plain eye. So what I would say is if a
15 phone is lying on the ground and it's -- and it's off but if
16 turned on -- and you can just see what is on the face of the
17 screen -- which, you know, if I had my iPhone turned on, I
18 could pick it up, and whatever is on that face of the screen,
19 when you can see it's on, I think that's fair game. I think
20 what wouldn't be fair game, then, would be to go into the
21 phone, if that's making sense.

22 THE COURT: So they could touch the face of it to get
23 it to turn on, though?

24 MS. THIBEAULT: I -- not examining the case law on
25 this issue and just thinking on my feet, I would say that's

1 probably fair. Because when we're out in public, if anybody is
2 on this type of iPhone, you know, the public can see what is on
3 the screen of your iPhone.

4 THE COURT: So plain view?

5 MS. THIBEAULT: Sure. Yeah, but not having examined
6 the case law on that very specific issue.

7 And so when the Government is required to prove by a
8 preponderance of the evidence that Mr. Hunt voluntarily
9 abandoned his rights to the phone, one of the factors that
10 Your Honor should be looking at is what evidence Mr. Hunt had
11 that the Government had his phone.

12 And so far, all I can gather from the Government's motion
13 is that Mr. Hunt should have known that the Eugene police could
14 have had his phone because of the conversation they had had at
15 the hospital, which is why I admitted Exhibit 4, so Your Honor
16 could understand the full scope of that, and also that bit of
17 evidence receipt that we have already been discussing.

18 THE COURT: But doesn't that video that you showed as
19 Exhibit 4 clearly show Mr. Hunt even knows the officer who
20 takes his phone? So had he believed that there were other
21 items from the scene taken by the Eugene Police Department, he
22 knew it was Eugene Police Department. He knew they were
23 investigating the potential homicide or -- or attempted
24 homicide, and he knew the officer.

25 MS. THIBEAULT: I would agree with you that he knows

1 the Eugene police is investigating the shooting and to him and,
2 arguably, would be familiar with the face of the officer. I
3 don't want to concede that Mr. Hunt, you know, as he's lying
4 there kind of highly medicated presurgery, is going to remember
5 that officer's name. But, sure, I think it's a fair assumption
6 that we can all agree that at the time Mr. Hunt was in that
7 hospital that he knew Eugene police were investigating what
8 happened.

9 I think kind of what we're all arguing about is what to
10 make of that. And what I will, again, point to is that it's
11 the Government's burden to prove that voluntary abandonment
12 occurred, and here we have multiple different inferences that
13 could occur from the circumstance.

14 THE COURT: How, as part of standing, your client has
15 to demonstrate possessory interest in something, is there -- is
16 it your position that there's no obligation whatsoever to --
17 for an individual to assert that they own something, that it's
18 theirs, even in a two-year period, to -- in order to have
19 standing to challenge it?

20 MS. THIBEAULT: Sure.

21 THE COURT: At what point does it become abandoned
22 when they know something is there and they don't do anything
23 about it, or -- or it's never -- it's always the obligation of
24 the police?

25 MS. THIBEAULT: Sure. This is what we're all

1 hovering around; right? Your Honor just asked me the central
2 question. So the answer that I'm going to give you, the rule
3 of law that I want you to take from this is that as part of
4 proving abandonment, the Government would need to prove by a
5 preponderance of the evidence that Mr. Hunt was on notice that
6 that object had been taken by police.

7 And here we have multiple different conflicting inferences
8 that could be made. Mr. Hunt is in the hospital. Police tell
9 him, "Hey, we're going to seize this phone you have here." To
10 a reasonable person in Mr. Hunt's position, that might indicate
11 they didn't take anything else. "They are not going to ask me
12 about anything else. Here they asked me about whether or not
13 I'm going to consent to a search of the phone. They didn't ask
14 me to consent to a search of the phone on scene." I guess the
15 Government doesn't have that. Right? That's one reasonable
16 inference.

17 THE COURT: Why is that even reasonable, though? It
18 seems like he knows that they have -- they are investigating a
19 crime scene; so if something is missing, who else would have
20 taken it?

21 MS. THIBEAULT: The person who shot Mr. Hunt. The
22 Government's theory is that -- and they're trying to use the
23 shooting as part of their case against Mr. Hunt -- is that the
24 shooting was drug-related. And so the person who shot Mr. Hunt
25 may very well have wanted that phone because that phone might

1 have connected the shooter to the crime. So that's one
2 inference of who could have picked it up.

3 Another inference of who might have picked it up is maybe
4 Mr. Hunt thought the other two women who were with him on scene
5 had that object, found out later they didn't, didn't know who
6 had it.

7 I -- I want to be clear that the defense's position is not
8 that there -- there is no inference that could exist that the
9 Eugene Police Department had seized the phone. I agree with
10 Your Honor. I think it would be kind of unfair for me to say
11 that that's not an inference that could be drawn here, but the
12 fact that that is one inference, among many, is the defense's
13 central argument here, and that it is the Government's burden
14 to prove by a preponderance of the evidence that the
15 relinquishment was voluntary.

16 And I'm going to suggest here, Your Honor, that that means
17 that Mr. Hunt had to be on some kind of notice that the Eugene
18 Police Department had that phone, and I think even though that
19 is one potential inference, it's one potential inference among
20 many.

21 The fact that when Mr. Hunt was told, "We're going to
22 seize the phone from you at the hospital. Do you want to give
23 us your password?" and invokes his right to say "No," I would
24 say another potential inference that we can draw from that
25 video is that, if Mr. Hunt had known they were going to search

1 his phone, he could have told them "No." Because this is a man
2 we know who, when they seized his phone, said, "No, I don't
3 want you to go through it." And so what I will say is, given
4 the fact that there are multiple competing inferences and the
5 Government has the burden here, that we just can't get to a
6 preponderance of the evidence.

7 I think the other issue that Your Honor has focused on --
8 I addressed earlier on, in terms of the timing, that the
9 Government had been using this Eugene shooting all along in
10 their search warrants on this federal case, and my -- my
11 question to you -- my ask of you was to hold the Government to
12 what date that phone really became of interest to them.

13 And what I want to focus on too is that the Fourth
14 Amendment -- the exclusionary rule's sole purpose is to deter
15 Fourth Amendment violations, and so I -- hypothetically, if we
16 imagine a scenario -- I hope the Government would agree with me
17 on this. Let's just imagine the Eugene Police Department
18 seizes the phone. They wait the 700 days. And then the Eugene
19 Police Department decides to get a search warrant for that same
20 phone. Abandonment issues aside, just putting that issue
21 aside, I would hope that we would all agree that under the
22 Fourth Amendment case law that delay is unreasonable.

23 And here the Fourth Amendment is broader than just
24 deterring one sovereign and then another sovereign and then
25 another sovereign. The sole purpose of the exclusionary rule

1 is to deter Fourth Amendment violations. And here, under the
2 Government's theory, even if the Eugene Police Department had
3 violated Mr. Hunt's rights, that the Federal Government can
4 come -- can just come in at the tail end and ignore all of
5 those previous violations because they are a separate
6 sovereign. I don't think the exclusionary rule is that narrow.
7 I don't think the Fourth Amendment is that narrow.

8 I think the Fourth Amendment and the exclusionary rule's
9 general purpose is to deter Government misconduct. And in this
10 case the Federal Government, especially given the fact that
11 they were relying on that very same shooting to investigate
12 Mr. Hunt in this case, can't just wash their hands of the
13 other -- the Eugene Police Department's Fourth Amendment
14 issues.

15 So, Judge, at the end of the day, I'm going to ask you to
16 find that the Government has not met its burden to show that
17 Mr. Hunt voluntarily abandoned his phone and that the delay in
18 the Federal Government realizing the phone was an interest and
19 then seeking a search warrant was unreasonable under the Fourth
20 Amendment.

21 Thank you.

22 THE COURT: Thank you.

23 Mr. Sussman?

24 MR. SUSSMAN: Well, Your Honor, it appears that
25 Mr. Hunt's arguments for suppression have evolved somewhat over

1 time since he filed his original motion. In his original
2 motion, he said that the police unlawfully seized both phones
3 without a warrant, without justification, without his consent,
4 and he claims in his original motion that the police told him
5 they were seizing both phones, because this was a very serious
6 crime.

7 Now, we know now that that, in fact, was false, that
8 that's not what happened, and that that's neither supported by
9 the facts nor the law. Because as you saw in the video -- and,
10 by the way, just for the record, the video was the body cam
11 worn by Officer Stropko -- S-t-r-o-p-k-o -- who was the officer
12 that contacted Mr. Hunt in the hospital.

13 We know that he referenced only the one phone that was
14 seized from Mr. Hunt's person. Only one phone was seized from
15 Mr. Hunt or from his belongings, and that was the white iPhone.

16 The black iPhone wasn't anywhere near there. It wasn't
17 seized at the hospital. It wasn't seized from Mr. Hunt. It
18 wasn't seized from Mr. Hunt's belongings. It was found in a
19 bed of bark dust in the parking area of an apartment complex,
20 out in the open, in plain view, in an area where a shooting had
21 occurred. That is where the black iPhone was seized.

22 So to the extent Mr. Hunt tells you in his original motion
23 that that phone was seized unlawfully, that is just flat wrong
24 because that phone was found by the police at a shooting scene
25 next to a bunch of spent cartridges, near blood stains, near

1 bullet fragments, near bullet holes, in an open area in a bed
2 of bark dust in plain view.

3 There was absolutely nothing unlawful about the seizure of
4 the black iPhone.

5 The only question really is whether the search of the
6 iPhone was reasonable under the Fourth Amendment. And before
7 we get to that, the first thing that has to happen is that
8 Mr. Hunt has to demonstrate that he has an expectation of
9 privacy in the contents of that phone. That's what -- the
10 whole thing comes down to timing here; right? Well, not the
11 whole thing, but one of the issues comes down to timing
12 because, really, there's no question that the phone was
13 searched, the black iPhone, personally, to a facially valid
14 federal search warrant. And Mr. Hunt does not claim in this
15 motion that that warrant was unsupported by probable cause, nor
16 can he, because he raised that claim before and it was already
17 rejected by Judge Mosman during the first round of suppression
18 motions.

19 So really what he's saying is, is that the Government just
20 waited too long to search it. But before he could raise that
21 argument, he has to demonstrate that he still has an
22 expectation of privacy in the phone, and he can't do that here
23 because he abandoned it.

24 Now, he clearly had an expectation of privacy in the white
25 iPhone because, I mean, it was seized from his belongings that

1 went with him to the hospital, and the officer told him he was
2 seizing it, and Mr. Hunt did not consent to it being seized or
3 searched and would not provide consent -- or would not provide
4 the passcode for the phone.

5 So he clearly had an expectation of privacy in the white
6 iPhone, and he had clearly asserted that expectation of
7 privacy. But, again, the white iPhone was never actually
8 searched. Well, they tried, but they couldn't extract anything
9 from it; so there's nothing to suppress there.

10 THE COURT: So do you agree with my assessment that
11 it should be denied as moot?

12 MR. SUSSMAN: Absolutely.

13 I also concur that, if technology develops somehow so that
14 they can eventually bypass the encryption between now and the
15 current trial setting and if we get data, then, of course, they
16 would be free to reraise that if we find anything of any value
17 on there. But, frankly, I don't think that's going to happen.

18 So set aside the white iPhone for now because the white
19 iPhone -- really the motion to suppress the white iPhone is
20 moot. There's just nothing to suppress.

21 Now, the black iPhone -- it wasn't seized from Mr. Hunt's
22 person or from his belongings or from anywhere near where he
23 was at the time. It was found in an open area at a shooting
24 scene, and he was the victim, not the suspect, not the target
25 of an investigation. He was the victim. When they looked at

1 that iPhone, they had no idea who it belonged to. It was just
2 an iPhone sitting in the bark dust.

3 And to the extent that Ms. Thibeault was saying to you,
4 "Oh, they could have picked it up and turned it on and looked
5 into it," if they had done that and found one shred of evidence
6 in there, you bet that they would be screaming that that was an
7 unlawful search. So the fact the iPhone was sitting there, I
8 don't think they had the authority to turn it on and look into
9 it.

10 THE COURT: Where does it say in your exhibits that
11 the officers had no idea whose phone it was?

12 MR. SUSSMAN: What exhibit are you referring to?

13 THE COURT: Any exhibit. What's the evidence of
14 that?

15 MR. SUSSMAN: Well, there's just no evidence that
16 they knew who it did belong to. I mean, it's an iPhone sitting
17 on the ground. I mean, here is an iPhone --

18 THE COURT: I understand.

19 MR. SUSSMAN: -- sitting on the ground.

20 THE COURT: From the circumstances here, how do I
21 need to find that -- or do I need to find that what you're
22 saying is based on any part of the record?

23 MR. SUSSMAN: Do you need a specific item that you
24 can point to to say the officers didn't know, when they looked
25 at it, that they didn't know, as they looked at it, who the

1 phone belonged to?

2 THE COURT: Well, what's the evidence that you're
3 relying on that you submitted in support of your response that
4 tells me what you've just argued orally?

5 MR. SUSSMAN: That they didn't know who the phone
6 belonged to?

7 THE COURT: Yeah. So where do I get that from the
8 evidence? Because I --

9 MR. SUSSMAN: Well, you can look at the property
10 receipt that the defendant submitted, which was the property
11 receipt for the items seized from the shooting scene by the
12 police, and you'll notice that nowhere on there does it
13 attribute anything found there to Dontae Hunt or to any other
14 specific individual. The only thing on that receipt is the
15 offense that they're investigating, which was assault in the
16 first degree.

17 THE COURT: And then there's the reference to the
18 keys are turned over by Officer Hart to an acquaintance of the
19 victim?

20 MR. SUSSMAN: Correct.

21 THE COURT: So one of the items is attributed to a
22 person, and that is the defendant?

23 MR. SUSSMAN: But not an item that is the subject of
24 the motion to suppress.

25 THE COURT: Understood. But it's not -- you know,

1 we're not talking in a vacuum here. So one of the items is
2 attributable, and I'm just trying to see how I can clearly
3 infer from the declaration that you have presented as evidence
4 what you're saying, which is they had no idea whose phone it
5 belonged to or what pieces of evidence tell me that that's
6 right?

7 MR. SUSSMAN: Well, another way to look at that would
8 be what evidence is there that they believed or knew that that
9 phone belonged to Dontae Hunt, and the answer is there's no
10 evidence of that either. The only inference you can draw from
11 that is nobody knew who the phone belonged to. There's no
12 evidence that anybody knew who the phone did or did not belong
13 to.

14 THE COURT: Whose burden is it to establish that?

15 MR. SUSSMAN: To establish their knowledge of who the
16 phone belonged to?

17 THE COURT: Their lack of knowledge.

18 Your theory depends on they didn't know whose it was and
19 that the defendant had an obligation to do something to --
20 because under the circumstances -- so you say it was in a
21 bed -- it was found in a --

22 MR. SUSSMAN: A bed of bark dust.

23 THE COURT: In the bark dust. Where does that come
24 from?

25 MR. SUSSMAN: There's a photograph of that in our

1 response.

2 THE COURT: Okay. But you didn't have anyone put it
3 in a declaration?

4 MR. SUSSMAN: No. Because I don't -- well, I don't
5 think that the federal agents could testify from their own
6 personal knowledge as to where the phone was found by the
7 Eugene police.

8 THE COURT: Although it doesn't have to be based on
9 personal knowledge.

10 MR. SUSSMAN: Well, I'm happy to submit the Eugene
11 police report if you would like that in the record, Your Honor.

12 THE COURT: I'm just trying to understand what
13 evidence you're basing your statements on.

14 MR. SUSSMAN: Well, I'm basing my statements on the
15 facts that were contained in the Eugene police reports, and the
16 facts were they found the phone in a bed of bark dust at the
17 shooting scene.

18 THE COURT: So that -- I didn't see that in your
19 pleading or -- and do I have -- which -- I do have some of the
20 Eugene police report. So you're talking -- is it Exhibit 187-2
21 to the defense exhibits? Tell me where you're looking at. I
22 just want to make sure I know where in the record that the
23 information you're stating -- factual information -- comes
24 from.

25 I'm not sure why that's confusing -- that you have to base

1 your response on evidence in the record.

2 MR. SUSSMAN: Well, I -- I know that in our response
3 to the motion to suppress we indicate that it was found in the
4 bark dust, and we provide a photograph taken by the police of
5 precisely where it was found. It's in ER 182, and the
6 photograph appears on page 5.

7 THE COURT: Okay.

8 MR. SUSSMAN: And the phone has a big red circle
9 around there for emphasis. But it shows the bed of bark dust,
10 and it shows the phone lying in the bed of bark dust. And to
11 the bottom right-hand corner of the picture, you can see blood
12 stains on the pavement.

13 THE COURT: Okay. All right.

14 MR. SUSSMAN: So let me see if I can pick up my train
15 of thought again here.

16 All right. So in her argument, Ms. Thibeault suggested
17 that it's possible that Mr. Hunt had been talking on that
18 phone, but as the Court pointed out, there's no evidence to
19 support that because we just don't know. We can't tell from
20 the parking lot surveillance video, which phone he was talking
21 on, whether it was white, whether it was black, or whether it
22 was some other phone. It could have been that phone or could
23 have been the white iPhone he had in his pocket. Nobody knows
24 what phone he was talking on when he was shot.

25 And she suggests to you that, oh, he probably just dropped

1 it and forgot about it and walked away and that momentary lapse
2 of control over the phone doesn't equate to abandonment. And
3 that's probably true if you look at those facts in isolation.
4 But there's more at play here.

5 Because remember that he was also carrying the Gucci
6 satchel that had the two guns in it over his shoulder, and that
7 was dropped as well.

8 And yet in the surveillance video you can see Rylie Jones
9 pick up the satchel, walk it over, and put it into the trunk of
10 the Lexus sedan that they had both arrived in. And then a few
11 minutes later you see her remove the satchel from the trunk and
12 bring it back, and that satchel went with defendant and Rylie
13 Jones to the hospital. It remained in the car when he went
14 into the hospital to get treatment.

15 And, of course, he had the white iPhone on his person and
16 in his belongings at the hospital. So he took that with him as
17 well.

18 He took the white iPhone with him. He took the Gucci
19 satchel with him. In fact, that satchel made a trip to the
20 trunk of a car and back again before it went with them to the
21 hospital. They took him -- he specifically took those things
22 with him, but he left the black iPhone behind.

23 THE COURT: And is it your position that that
24 evidence shows both that the defendant didn't assert any
25 interest -- it sort of goes to the abandonment that he knew

1 things were potentially going to be picked up, but he asserts
2 ownership over the things he wants to assert ownership over but
3 not the black iPhone.

4 MR. SUSSMAN: Correct. And, importantly, for our
5 purposes here, he never ever contacted the Eugene police to
6 assert ownership of that phone or to ask for its return.

7 Now, of course, today he's telling you, well, the
8 Government has the burden of proving that he specifically knew
9 that that phone was in the Eugene police custody before they
10 can charge him with failing to assert an ownership interest
11 over it.

12 And that argument might have some force but for two
13 important facts. First, he knew, unequivocally, that the
14 Eugene police seized the white iPhone because you saw the
15 video, and the officer told him about it to his face; and yet
16 he never made any effort to get the white iPhone back either.
17 And, second, even after he knew that the Eugene police had the
18 phone because he got -- or because he got those reports in
19 discovery from the Government and even after he knew that we
20 had gotten the search warrant, he never asked for the black
21 iPhone back then either.

22 He took the white iPhone. He took the Gucci satchel. He
23 left the black iPhone behind. That's abandonment. And because
24 he abandoned that property, he relinquished any expectation of
25 privacy he had in it.

1 Now, even if Mr. Hunt could show that he retained an
2 expectation of privacy in the black iPhone, he cannot establish
3 that there was a Fourth Amendment violation with respect to its
4 search. He's trying to attribute to the Federal Government the
5 actions of the Eugene Police Department. Even though they were
6 separate agencies, from separate sovereigns, involved in
7 completely separate investigations with separate focuses and
8 separate targets.

9 In the Eugene shooting investigation, Dontae Hunt was the
10 victim. Not a target, not a suspect. They were trying to
11 figure out who shot Dontae Hunt.

12 The Federal Government played no role whatsoever in that
13 shooting investigation, nor did Eugene take any role in the
14 federal drug investigation. In fact, the federal drug
15 investigation didn't even start for another seven months, and
16 it began after a person died from an overdose of -- after
17 ingesting a counterfeit oxycodone pill laced with a fentanyl
18 analog.

19 And the investigation was able to trace that back to
20 Dontae Hunt. And as the investigation continued, of course,
21 the federal investigators became aware that Mr. Hunt had been
22 shot in Eugene, and they put that in their search warrant
23 affidavits, but they had no reason to believe at that point
24 that the shooting in Eugene was directly connected to the drug
25 investigation. And, in fact, interestingly enough, that was a

1 major bone of contention with the defense attorney who's
2 representing him at the first round of the motions to suppress,
3 where he argued in his pleadings and again at the suppression
4 hearing that the fact that he was shot in Eugene seven months
5 earlier had nothing whatsoever to do with the investigation.

6 So it seems now that this defense team is telling a
7 different tale, saying, "Oh, they should have known right then
8 that it was part of the federal drug investigation," where
9 earlier their predecessor was saying that had nothing
10 whatsoever to do with the federal drug investigation. They're
11 talking out of both sides of their mouth here.

12 Now, I understand it was a different attorney representing
13 him then, and he may have had a different strategy in mind;
14 but, again, this gets back to the whole theory for suppression
15 seems to be evolving as the case goes on.

16 It wasn't until the drug investigation had progressed that
17 the search warrants at the residences were executed, that the
18 phones were seized, that subsequent search warrants were
19 executed on those phones, and that evidence was derived from
20 those phones toward the middle or the end of December of 2019
21 that the investigators actually had probable cause to believe
22 that the phones seized by Eugene were going to have evidence of
23 the -- pertinent to the federal drug investigation in them.

24 It was a very short time after they had that probable
25 cause determination that they got the federal search warrant

1 and that they searched the phone and that they found the
2 evidence.

3 Now, Ms. Thibeault asks you to hold the federal agents
4 responsible for the delay by the Eugene Police Department. And
5 she says that the Federal Government shouldn't be able to walk
6 away or clean the slate based on something that the Eugene
7 police did wrong.

8 But, Your Honor, with all due respect, the Ninth Circuit
9 disagrees. This is a case that I just became aware of this
10 morning, although it's not a new case, but it directly pertains
11 to that point raised by Ms. Thibeault. And the case is *United*
12 *States v. Basinger*, which is B-a-s-i-n-g-e-r. It's a Ninth
13 Circuit case. The citation is 60 F.3d 1400. It's from 1995.

14 And in that case the Government offered, at trial,
15 evidence of an earlier traffic stop by a different officer from
16 a different agency in a completely unrelated investigation, and
17 the defendant said that should have been excluded because that
18 original traffic stop by that original officer in that other
19 case was done in violation of the Fourth Amendment.

20 And the Ninth Circuit said, citing an earlier case called
21 *United States v. Lopez Martinez*, that unless there's some
22 suggestion of bad faith or collusion by officers involved in
23 the separate investigation and so long as their focus wasn't on
24 the subsequent investigation, which is exactly the case here,
25 then suppression is not warranted.

1 And that holds true here as well.

2 The defendant tells you that, look, there were over 700
3 days that elapsed between the seizure of those phones between
4 the Eugene police and when the federal agents executed the
5 search warrant on them. But by that -- that count, though,
6 relies on sort of merging together into one big investigative
7 blob things that were done by the different agencies in
8 unrelated investigations, conducted by separate sovereigns.
9 And that rely -- in order to make that argument, she has to
10 convince you that every single day counts from the moment the
11 Eugene police seized the phone. But I don't think that's a
12 reasonable reading of the Fourth Amendment, and I don't think
13 it's reasonable for you to hold the federal officers
14 accountable for that because, first of all, they weren't
15 involved in the investigation; second, they didn't direct the
16 Eugene police to do that; third, they didn't ask the Eugene
17 police to sit on that stuff; and, fourth, they didn't have
18 anything whatsoever to do with the Eugene investigation.

19 To the extent that the Fourth Amendment's exclusionary
20 rule is designed to deter police conduct -- or police
21 misconduct and to deter future Fourth Amendment violations, we
22 have to ask ourselves, "What is it here? What is the deterrent
23 value?" When the federal agents are not involved in the Eugene
24 investigation. When the federal agents eventually determine,
25 through their ongoing investigative efforts, that those phones

1 could contain evidence pertinent to their investigation and
2 then they promptly get a warrant to search them, where is the
3 conduct to be deterred? What is the deterrent value there?

4 This is not an instance where the police hold up
5 undelivered U.S. Mail for weeks before getting a search warrant
6 for it, as was the case in *Dass*, that was cited by the defense.

7 And this isn't a case where items were taken from --
8 directly from an individual, and the evidentiary value of those
9 items were immediately apparent, which was the case in
10 *Mitchell*.

11 This is not a case where the Eugene Police Department held
12 onto those phones for two years and then the Eugene Police
13 Department got a warrant to search them for evidence of a
14 two-year-old shooting. This is a case about a phone that was
15 found in a bed of bark dust at a shooting scene that nobody
16 laid claim to, that nobody asked for the return of, who the
17 owner of which nobody knew at that point. This is a case in
18 which federal investigators learned of the potential
19 evidentiary value of those phones well into their own
20 investigation sometime later.

21 Now, didn't they know that there was a connection between
22 Dontae Hunt and the shooting back in 2018? Well, yeah, they
23 did. Because when they served the search warrant at his
24 residence, they found the box for the gun under his bed. They
25 found the handwritten receipt to Rylie Jones in his bedroom.

1 So, yeah, they knew there was evidence linking
2 Dontae Hunt's residence with the shooting, but what they didn't
3 know was that there would be anything on those phones that
4 connected the federal drug investigation because those phones
5 were seized in December of 2017. The federal drug
6 investigation didn't even begin until June of 2018. And it
7 wasn't until that investigation had run its course that they
8 learned that his drug trafficking activities actually dated
9 back to the time of the shooting and therefore there could be
10 evidence on those phones.

11 THE COURT: Let me ask you, Mr. Sussman, I can't tell
12 from Scott McCollister's declaration when the federal
13 investigators knew about the Eugene police actually seizing the
14 black iPhone. I couldn't tell -- I didn't see it in my
15 materials, but does that even matter? I mean, we talked about
16 development of probable cause, but do I need to know when
17 the -- sort of to the point at which the federal investigators
18 become responsible for Eugene delay? Is that when the federal
19 investigators know that the iPhone -- black iPhone exists?

20 MR. SUSSMAN: No, I don't think so. Because they --
21 you know, they -- they may know that the phone is in evidence.
22 I mean, if they got the reports from the Eugene Police
23 Department, they're going to know that the phone was in
24 evidence. But the question becomes when did it become of
25 interest to their federal drug investigation? And the

1 Government's position is not until they had sufficient probable
2 cause to believe there was going to be evidence connected to
3 the federal drug investigation on the phone, and that wasn't
4 until the middle to the very end of December of 2019.

5 That's the pertinent time frame for the Court's Fourth
6 Amendment reasonableness analysis.

7 So, Your Honor, in sum, Mr. Hunt took the white iPhone,
8 took the Gucci bag, left the black iPhone in the bark dust.
9 That's an abandonment. He no longer had a reasonable
10 expectation of privacy in it. But even if he could show that
11 he did, the delay attributable to the federal investigators, in
12 getting a warrant to search the phone, just does not rise to
13 the level of unreasonableness under the Fourth Amendment.

14 And for those reasons, Your Honor, defendant's motion to
15 suppress should be denied.

16 THE COURT: All right. Thank you. Any response?

17 MS. THIBEAULT: Sure, Judge. I just want to go
18 through a list of points that were just raised by the
19 Government. So to the extent these are kind of out of temporal
20 order, I apologize.

21 The first thing I want to mention is the Government's
22 citation. I think it was *Basinger*. I wrote down the citation.
23 I haven't had the opportunity to peruse the case that they're
24 citing to today, and I don't have internet access; so I can't
25 pull it up. So what I would ask is to the extent that

1 Your Honor is going to base your ruling on that case, I would
2 ask for an opportunity to respond to that.

3 THE COURT: Yeah, that's fine. We've already found
4 that case, but --

5 MS. THIBEAULT: Great. Thank you.

6 THE COURT: Certainly.

7 MS. THIBEAULT: Okay. What I will note is -- not
8 having reviewed that case, I will note that, even in the
9 Government's summary of that case just now, it seems like those
10 factually are very different than what we have here. Because
11 the Government's summary of that case is where the two
12 investigations are completely separate. I -- I think that's
13 what I heard.

14 And here the Federal Government was using the Eugene
15 shooting for the basis of their probable cause in warrants from
16 essentially the spring 2018 on.

17 So, again, you know, the Government is trying to have it
18 both ways. They are saying, "Oh, this Eugene shooting is
19 totally separate from our investigation. Mr. Hunt was a victim
20 in that, and the Federal Government was doing their own thing,"
21 but that's just not true. The Eugene shooting was part of the
22 search warrants that they had executed as part of Mr. -- as
23 part of the Federal Government's investigation into him. And
24 so these two investigations were not separate at all.

25 The fact that prior defense counsel was arguing that they

1 should have been separate is a completely different issue
2 because here what we're talking about is how the Federal
3 Government treated these two investigations, not whether they
4 should have been treated that way.

5 The issue here is that the Federal Government was not
6 treating these as separate investigations. They were using the
7 Eugene shooting as their probable cause in this case from
8 essentially early on. And I want to note specifically on
9 timing issues, you know, I -- I hear different generic timing
10 about they didn't learn that the phone this probable cause
11 until sometime later and then this mention of a December 2019
12 delay.

13 And two things on that. In the Government's own motion,
14 page 8, second paragraph, they got search warrants for phones
15 recovered from the defendant's premises in October of 2018, and
16 they got authorization later, on December 13, 2019, for other
17 phones. So I -- I understand he's referencing that
18 December 13, 2019, date; but they got a search warrant for
19 phones back in October of 2018.

20 And moreover, according to their own motion on page 7, on
21 September 27, 2018, they found connections that they're going
22 to argue connect Mr. Hunt's drug trafficking to the Eugene
23 shooting back on September 27 of 2018.

24 THE COURT: But isn't the -- the later search warrant
25 that they say connected it to the 2017 -- January of 2017 --

1 2017 drug trafficking, which would provide the probable cause
2 to believe that Mr. Hunt was engaged in drug trafficking in
3 December of 2017?

4 MS. THIBEAULT: Well, I understand that's what
5 they're --

6 THE COURT: I said 2018. Excuse me. January of 2018
7 and December of 2017.

8 MS. THIBEAULT: Sure. I understand that's what
9 they're saying, but they are also seeking to use evidence from
10 the execution of the warrant on September 27, 2018, the
11 evidence that was found under his bed, and they're saying
12 that's part of the Eugene shooting and drug trafficking, and
13 all that evidence was found on September 27th of 2018. And
14 they plan to use that as evidence in their case-in-chief
15 against Mr. Hunt.

16 So the idea that --

17 THE COURT: But they're gun charges.

18 MS. THIBEAULT: Yes. And it was connected to the
19 Eugene shooting. So this idea that nothing related to the
20 Eugene shooting really had evidentiary value in connection with
21 drug trafficking, I think is contradicted by that September 27,
22 2018, search warrant execution.

23 And I'll note here -- and again, I want to focus -- I know
24 I keep saying it. I'll just keep saying it again and again is
25 that it's the Government's burden to establish that Mr. Hunt

1 voluntarily abandoned his privacy interests.

2 And in regards to the delay, it's their burden to
3 establish what delay we're talking about. And here the
4 declaration from Scott McCollister just says, "We were aware of
5 the shooting in Eugene, and I included information about it in
6 various warrants, even though it was a subject of a separate
7 investigation. Scott McGeachy and I learned that the Eugene
8 police had not searched any of the iPhones they seized the
9 night he was shot."

10 No officer put the date they learned of that in this
11 declaration. And I would submit that the absence of that date
12 has meaning.

13 This is the Federal Government. They have the ability to
14 have their law enforcement write detailed affidavits that are
15 supported by the facts of this case. And the idea that knowing
16 that that is kind of a critical date here and the Federal
17 Government has chosen not to have their witnesses include that
18 information in the affidavit or explain in any other kind of
19 affidavit, when they have that information, goes to the
20 Government failing to meet their burden.

21 And I also want to note in regards to the iPhone situation
22 at the hospital, it's unclear to me where the Government is
23 getting that Mr. Hunt was told, "We are seizing the white
24 iPhone." They've told, "We're taking your phone."

25 They told Mr. Hunt they were taking his phone and they

1 were going to get into it regardless of if he wanted to. So
2 why would Mr. Hunt feel like he even had the ability, if we
3 even assume that he knew the Eugene Police Department had the
4 other phone, to go get it, when law enforcement told him, "Hey,
5 you told us you don't want us to take your phone. You told us
6 you don't want to give us the password. We're doing it
7 anyway." That would tell a person in Mr. Hunt's position that,
8 even if he was on notice that they had his phone, that nothing
9 would come of it.

10 And what I will submit here, just in closing, is that I
11 think there are many inferences to draw -- many potential
12 inferences to draw from the facts of where the phone was found,
13 of lack of formal information provided to Mr. Hunt, and the
14 very fact that there are multiple inferences that could be
15 drawn from that and that the Government has made no effort or
16 put no evidence in the record to contradict one inference over
17 the other. Given that their burden is by a preponderance of
18 the evidence, they simply can't get there.

19 They shouldn't get to rely on Mr. Hunt's -- on the theory
20 that he abandoned his interest in the phone when there are
21 multiple competing inferences that they have chosen not to
22 provide evidence on in order to clear them up.

23 And so at the end of the day, I -- this isn't a 0/1 --
24 this isn't a 0/1 analysis. It's factually intensive; and,
25 quite frankly, it's a legal issue that I think is somewhat

1 novel.

2 And to what extent is the Government required to place
3 Mr. Hunt or a defendant on notice that they have become
4 interested in an object that belongs to them?

5 What I'll say here is my proposed rule of law to you,
6 Your Honor, is that, when the Federal Government became
7 interested in the phone, believed it belonged to Dontae Hunt,
8 that without him knowing that they had that, that they had that
9 interest, there was no way Mr. Hunt could have voluntarily
10 abandoned the interest in his phone because there's no proof
11 that he had any notice that they had that phone.

12 And, again, this is a case of multiple competing
13 inferences. And given the fact that there are multiple
14 competing inferences, the Government simply has not met their
15 burden today.

16 THE COURT: Let me ask one question, Ms. Thibeault --
17 and this is for the Government as well. I note that neither
18 side actually submitted the warrant for the black iPhone or
19 either iPhone as an exhibit in this case. I assume it's
20 because that is not really part of this analysis. That was
21 already challenged in front of Judge Mosman?

22 MS. THIBEAULT: I think that's correct. That the
23 issue of probable cause was already challenged in front of
24 Judge Mosman. We hope that that was adequately preserved. I'm
25 not backing down from those arguments. I just don't think,

1 given the previous orders in those, I'm free to argue about the
2 warrant.

3 THE COURT: The warrant itself just isn't relevant to
4 the analysis I need to make?

5 MS. THIBEAULT: I think so.

6 THE COURT: Does the Government agree with that?

7 MR. SUSSMAN: The content of the warrant is not
8 relevant. I think what is relevant is when it was obtained and
9 how that figures into the reasonableness of any delay.

10 THE COURT: And I assume -- I don't -- because it was
11 not submitted as an exhibit, is there any reason I -- I assume
12 you -- you submitted it -- somebody submitted it back before --
13 as an exhibit to one of the Judge Mosman pleadings.

14 MR. SUSSMAN: It was originally attached as an -- I
15 believe it's Exhibit 21 to the defendant's motion to suppress,
16 and I -- I apologize. I don't have the ECF number of the
17 original motion to suppress, but it's going to be in the
18 record.

19 THE COURT: We can find it. So I just thought at
20 some point I should look at what warrant too.

21 MR. SUSSMAN: Yeah. No, it is in the record,
22 Your Honor.

23 THE COURT: Okay. All right.

24 I'm going to take this motion under advisement. I should
25 have a decision to you very quickly. I know we're on a tight

1 time frame here. So I am mindful of that.

2 And if not the end of this week, early next week I hope to
3 have my decision to you.

4 Let's -- why don't we take a 10-minute break, just to then
5 go talk about the discovery issues. So let's resume at 11:45.

6 (Recess taken.)

7 THE COURT: We're back on the record. We have all
8 counsel present. We'll go over the one aspect of the motion to
9 compel, which is for the defense's seeking disclosure of, as I
10 understand it, all documents related to the Lorenzo Jones RICO
11 case, which is a separate, ongoing RICO prosecution.

12 It -- let me tell you my inclination first, and then
13 probably there's a couple of questions that I have.

14 My inclination is that the defendant does not get the vast
15 majority of that information in an unrelated investigation for
16 all the reasons stated, actually, in the Government's
17 opposition.

18 The question I do have is whether there is any limited
19 discovery from that case that does relate specifically to any
20 inferences that the Government might be seeking to introduce
21 regarding the December 2, 2017, shooting regarding drug
22 trafficking, and I just can't -- so I wanted the -- I thought
23 it would be helpful for my thinking about the case -- and then
24 I'll allow each of you to argue whatever you would like in
25 support of your respective positions -- but whether -- exactly

1 what evidence the Government is seeking to introduce in this
2 trial regarding the December 2, 2017, shooting.

3 MR. SAX: Thank you, Your Honor. The Government --
4 should I start, or do you want to give defense --

5 THE COURT: I'm asking the Government that.

6 MR. SAX: The Government does not intend to introduce
7 any evidence about the motive of that shooting or the identity
8 of the shooter or his gang affiliation. The Government does
9 intend to ask law enforcement whether the person in the video
10 has been arrested and whether they're being prosecuted, but we
11 won't get into who they are or why they might have done what
12 they did.

13 THE COURT: So what about the shooting is relevant?
14 I guess you're talking about guns.

15 MR. SAX: It's the video that makes it relevant. And
16 in the video, the Government's theory is the defendant is
17 holding a Gucci satchel, and that satchel is then, in the video
18 after the shooting, brought to a car, then brought to a
19 different car, and then a Gucci satchel is later found in
20 Aeisha Thomas' car, and it's the Government's theory that that
21 video helps establish defendant's possession of the satchel to
22 make its case for Count 4, which is felon in possession of a
23 firearm.

24 One other thing I just want to note is Count 5, the 924(c)
25 charge, relates to three firearms that do not relate to the

1 Eugene event. Those are three guns that were found much later
2 at defendant's residence.

3 THE COURT: So to what extent is the Government
4 planning to introduce evidence of the defendant's motive for
5 carrying the satchel, the Gucci satchel, with the firearms on
6 December 2, 2017?

7 MR. SAX: We don't intend to get into that. It's the
8 three guns from the Dekum residence that make up the firearms
9 in Count 5.

10 THE COURT: I'm not asking about Count 5, but in
11 terms of what you plan to introduce about the Gucci satchel
12 guns.

13 MR. SAX: Well, we'll establish his knowing
14 possession of the firearms as part of the elements that the
15 Government intends to prove, but his reasons for why he might
16 have carried the guns -- those guns we're not going to get
17 into.

18 THE COURT: So in terms of -- because the suggestion,
19 as I understood it from the defendant's briefing, is you're
20 seeking to present inferences of having guns as part of drug
21 trafficking, and therefore some of the other motives for the
22 shooting from -- for Lorenzo Jones engaging in the shooting
23 come up, but that's the piece that I just -- whether or not
24 under Rule 16 that is -- they have made the showing of
25 materiality is what I'm trying to understand.

1 MR. SAX: I'm not quite understanding the question.

2 THE COURT: So the question is are they entitled to
3 know if -- if you're going to -- if the Government is going to
4 introduce evidence that Lorenzo -- in this case, that
5 Lorenzo Jones shot Mr. Hunt as part of a drug-related --

6 MR. SAX: That's not our intent at all. We are not
7 going to talk about the identity of the shooter or why they may
8 have acted.

9 THE COURT: So the only -- or why Mr. Hunt is
10 carrying firearms?

11 MR. SAX: Why he's carrying those firearms. Correct.
12 We are not getting into that.

13 THE COURT: And with regard to the shooting piece --
14 is it only that you can't really sever that from the video
15 because --

16 MR. SAX: Exactly. We have him carrying the satchel
17 before the shooting, and then after the shooting there's a
18 flurry of activity where the satchel is brought from -- I think
19 it's off camera -- on camera to a Lexus, then from a Lexus to a
20 departing Honda Civic, and that's a Honda Civic that's later
21 the subject of a vehicle stop where a tan satchel is recovered.

22 THE COURT: Have you all -- the Government, that
23 is -- turned over any discovery regarding the December 2, 2017,
24 shooting and guns? I mean, obviously, the search warrant has
25 been turned over.

1 MR. SAX: We turned over police reports and the
2 surveillance video evidence receipts and photographs from the
3 scene of the shooting.

4 THE COURT: Okay. Is something -- assuming the
5 defense requests were about -- exclusively about -- not the
6 entirety of the Jones investigation but about just the
7 December 17, 2017 -- December 2, 2017, shooting, is it -- what
8 would not be included, as a general matter, with the material
9 that they're -- that you have already turned over?

10 MR. SAX: And I neglected to mention that we also
11 turned over body cam footage from those events.

12 The follow-up investigation into who the shooter is, and
13 really anything that happened after the shooting related to the
14 investigation into the perpetrator.

15 THE COURT: Okay. So, really, the shooting --
16 evidence about the shooting itself. Okay.

17 Let me hear any argument that the defense wants to make.

18 MR. ROBB: Certainly. Just to clear up the record, I
19 move to admit what I have labeled as Defense Exhibit -- it's
20 labeled as Exhibit 102 because I thought the other one might be
21 101, but it's the third superseding indictment in
22 Case 3:19-cr-00333, State v. Ronald Rhodes, Javier Hernandez,
23 and Lorenzo Jones.

24 I know that Your Honor is really familiar with that case,
25 but I want to just make sure that the record is clear on that.

1 A few kind of preliminary points that I'll make also for
2 the benefit of those -- those reading along at home, and when
3 that ever happens is that in that indictment the Government
4 ties the prosecution of Lorenzo Jones to drug -- to drug
5 trafficking. Part of the Government's theory of the conspiracy
6 charges in the Lorenzo Jones case is that the Hoover gang
7 engages in a lot of unlawful activity -- drug activity being
8 one of those things that they do -- and that part of the
9 unlawful acts, in furtherance of those other unlawful acts, is
10 to use violence, including violence using firearms, to sort of
11 scare off other people that are going to compete with their
12 unlawful drug trafficking, and that's part of the MO of the
13 Hoover gang.

14 In some of the overt acts that the Government has pled in
15 that case that are in furtherance of all of these goals of
16 Lorenzo Jones' support of the -- of the Hoover gang is shooting
17 Dontae Hunt on December 2nd of 2017.

18 So right now the Government, in two different
19 prosecutions, is taking two completely different theories of
20 why that shooting happened. In this indictment, they're saying
21 that the Hoover gang, of which Lorenzo Jones is a member of,
22 participates in drug -- drug trafficking activities and in
23 furtherance of that, uses firearm violence to support that and
24 that part -- one of the overt acts, as part of that enterprise,
25 is shooting Dontae Hunt on December 2nd.

1 That's the -- that's the case that the Government has laid
2 out against the person that they have charged, in part, with
3 shooting Mr. Hunt.

4 So to the second, kind of, thing I'll say, as a
5 preliminary point, is that Mr. Sussman is absolutely correct.
6 Brian Walker filed a motion to sever the firearm possession
7 count on December 2, 2017, with the rest of the remaining
8 charges, making that precise argument. He says, "This is not
9 relevant to drug" -- that there's no evidence -- that the basis
10 for severance is that the possession of the -- that the
11 circumstances of the shooting are not relevant to the drug
12 trafficking activity that they've pled in the rest of the
13 counts and one that includes -- I'll swing back around to this
14 again -- the 924(c) charge, which Mr. Sax correctly notes
15 they've kind of pled in the indictment as just relating to the
16 firearms seized during the September 27th execution of the
17 warrant, and they haven't pled that he -- that he possessed the
18 firearm on December 2nd in furtherance of the drug trafficking
19 activity otherwise pled.

20 And, Your Honor, based on the representations that Mr. Sax
21 has made, I would like to reraise the motion to sever because
22 the arguments that the Government is making right now are
23 opposite to the arguments that they made to Judge Mosman to --
24 that led Judge Mosman to deny the motion to sever that count
25 from the remaining charges.

1 What the Government told Judge Mosman at that time was
2 that Mr. Walker's argument for severance -- and I'm quoting
3 from page 2 of the Government's response to the motion to
4 sever -- that the defense argument ignores the fact that his --
5 Mr. Hunt's -- possession of the firearms occurred during the
6 course and in furtherance of the conspiracy, that firearms are
7 tools of the trade for drug traffickers, and that evidence of
8 the defendant's possession of those guns -- again, we're
9 talking about the December 2nd guns -- that that evidence is
10 related to the remaining -- the remaining charges.

11 So the Government has, in a variety of different contexts,
12 both in the Lorenzo Jones case and even inside Mr. Hunt's case,
13 is taking a couple of different positions on why that shooting
14 occurred and what the Court should do with that evidence.

15 It took me -- I mean, this didn't -- I -- without
16 abandoning any requests, I understand Your Honor's inclination
17 that material that is directly relevant to specifically the
18 December 2nd shooting might be something that is discoverable
19 under Rule 16, but things further afield than that might not
20 be.

21 THE COURT: And I'm not certain on the December 2nd,
22 but that's what I feel like I --

23 MR. ROBB: So I -- so here's the -- there's kind of
24 the factual nuances that the Government -- it took me a while
25 to kind of process this. It didn't seem like a particularly

1 close issue to me; so I was trying to figure out what the
2 Government meant.

3 So the position that the Government is taking is a very
4 nuanced one and a very narrow one. The position that the
5 Government is taking, at least as -- when they were arguing the
6 motion to sever, is that Mr. Hunt's possession of the firearm
7 was related to the drug charges but the fact that Mr. Hunt was
8 shot by somebody was not related to the drug charges. I mean,
9 that's really the two factual assertions that the Government
10 necessarily needs to make in order to render the underlying
11 investigation of who shot Mr. Hunt not material under an
12 analysis under Rule 16.

13 But here is the paradox that I think the Government is in,
14 is those assertions are testable, and they're testable by
15 evidence that the Government has and is refusing to give.

16 So I -- I think one of two things needs to -- I mean, so,
17 one, I think, because the evidence of possession is primarily
18 circumstantial, any motive that Mr. Hunt would have had to
19 possess -- to happen to possess firearms on that night is
20 certainly relevant, and the defense has the -- should have the
21 opportunity to examine material in the possession of the
22 Government that might be relevant to that.

23 THE COURT: When you say it's "circumstantial," is it
24 because there's a question of whether Mr. Hunt knows what is in
25 the satchel that he's carrying?

1 MR. ROBB: There's no evidence of when the guns were
2 in the satchel. The only evidence of when the guns were
3 contained in the satchel was much later, when Ms. Jones
4 possessed the satchel.

5 THE COURT: So later that same evening?

6 MR. ROBB: It's a circumstantial inference that you
7 need to draw that the guns were in the satchel at the time that
8 Mr. Hunt was carrying it.

9 THE COURT: Although don't officers see the -- and
10 I'm not -- obviously, I have not seen the full surveillance
11 video.

12 MR. ROBB: Right.

13 THE COURT: But it sounded like you see Mr. Hunt with
14 the satchel. You don't know what's in it because you can't see
15 through it, but he's carrying something. Then it's picked up
16 by -- I don't know if it's Rylie Jones or Mr. Hunt's
17 girlfriend -- put in the Lexus; then it's seen transferred to
18 the Honda, and then police stop them on the way to the hospital
19 or after.

20 MR. ROBB: No. It's a little bit more --

21 THE COURT: Okay.

22 MR. ROBB: -- more attenuated than that.

23 So, one, it's an inference that the same satchel that
24 Mr. Hunt is carrying is the one that the guns were ultimately
25 in.

1 You can draw that inference just on the general size and
2 shape of the satchel and kind of the car that it's in, based on
3 the video, but it's certainly not a -- something that direct
4 evidence confirms that that is indeed the same -- the same bag.

5 So that's a little bit of a side point of what I was going
6 to try to get into.

7 THE COURT: Let me just jump in about something you
8 said before that. I'm having difficulty understanding why
9 Mr. Jones's motive as the alleged shooter of Mr. Hunt on
10 December 2nd, why that matters. So what? So what? He was
11 whatever. He wanted to kill him because he's in the Hoover
12 gang, doesn't matter.

13 MR. ROBB: Did Mr. Hunt know that Mr. Jones was in --
14 or whoever shot him, I mean, did he -- did Mr. Hunt know that
15 whoever shot him had a motive to shoot him?

16 THE COURT: Why does what matter in -- for a jury to
17 determine whether Mr. Hunt knowingly possessed the firearms?

18 MR. ROBB: Because I think the evidence demonstrates
19 that these aren't his firearms. These are Rylie Jones's
20 firearms that she's firing at the firing range and are with her
21 when they're found. So a --

22 THE COURT: But that's --

23 MR. ROBB: And so what the Government is alleging is
24 he specifically possessed them on that day and time.

25 So the question becomes what is the circumstantial

1 evidence that makes that more likely that he did choose to arm
2 himself with Rylie Jones's firearms on that night? And the
3 circumstances of that night are highly relevant to that.

4 Whether I -- I am coming home from somewhere, whether I'm
5 choosing to be armed or not, that choice will depend on all of
6 the attendant circumstances surrounding what is happening in my
7 life at that point.

8 THE COURT: But aren't you -- in a way, it's -- if
9 the Government gets in evidence that Mr. Hunt knew that
10 Mr. Jones was going to get him, that's worse for your case.

11 MR. ROBB: Absolutely. And under Rule 16, even if
12 it's worse for the case, we get it.

13 And vice versa --

14 THE COURT: But the Government is not even going to
15 present that evidence.

16 MR. ROBB: Well, they --

17 THE COURT: Right?

18 MR. ROBB: The Government is choosing not to present
19 evidence that it has. It's making a choice not to present
20 evidence that it has acknowledged to the Court that it has, and
21 that's the -- that's the whole point of Rule 16 is that the
22 Government doesn't get to have evidence, make tactical choices
23 not to use it, and then, when it's material to potential
24 defenses, also choose not to turn it over to the defense so the
25 defense gets to make its own choices about what evidence is

1 relevant and what is not and what to develop and in -- what to
2 develop in investigation follow-ups on and how to otherwise
3 prepare a defense based on evidence that's in the Government's
4 possession, that's not otherwise findable by the defense, and
5 that's material to the defense of the case.

6 THE COURT: So, again, it's -- you're not arguing
7 that it's *Brady*.

8 MR. ROBB: I don't know if it's *Brady* or not.

9 THE COURT: So --

10 MR. ROBB: And I think that I have an inference that
11 it is *Brady*.

12 So what the Government is saying in the motion to sever
13 response is that Mr. Hunt -- is that guns are tools of the
14 trade of drug dealers, Mr. Hunt was engaged in the drug
15 conspiracy that they have charged on December 2nd at the time
16 that he has those firearms, and that evidence of that
17 possession of the firearms is relevant and admissible to the
18 jury considering the remaining -- the remaining charges.

19 One of the charges is the 924(c) charge. That happens to
20 be the most serious charge that Mr. Hunt faces and the most
21 important one, as in terms of the defense, to challenge.

22 What matters for the 924(c) charge is what Mr. Hunt's
23 intent was in possessing firearms and whether Mr. Hunt
24 possessed the firearms for the purposes of furthering any
25 drug -- furthering the charged drug trafficking.

1 So why Mr. Hunt chose -- if the Government convinces the
2 jury that he did possess firearms, the next question for the
3 jury, necessarily, in the 924(c) charge, is that the reason
4 that Mr. Hunt possessed the firearms was to further the other
5 drug trafficking activity that's also been charged.

6 And in their opening statement, we -- I mean, we -- we
7 know how the Government is going to argue that to the jury.
8 They are going to put on an expert witness. That witness is
9 going to say, "Guns are tools of the trade of drug dealers.
10 The reason why drug dealers have guns is to protect themselves
11 and their guns -- and their drugs from other drug dealers.
12 This is a violent trade. It's a black market. There are
13 violent people. There's violence that goes on. So the reason
14 you, jury, get to infer that his possession of firearms was in
15 furtherance of his drug -- of the drug trafficking was that
16 people who deal drugs might get shot at or might otherwise have
17 people want to do them harm; and, therefore, that -- to guard
18 themselves against that, it behooves a drug dealer to arm
19 themselves, and here we can show you that Mr. Hunt was armed."

20 The other thing that the Government wants to show the jury
21 in this case and then get to argue that it's relevant to the
22 924(c) charge is Mr. Hunt actually being shot. And not just
23 being shot, that a -- another human being arrived at his -- at
24 the apartment complex that his girlfriend was living at 45
25 minutes or so before he did and sat there in the shadows for 45

1 minutes, waiting for Mr. Hunt to walk out from his car, and
2 that the moment that Mr. Hunt walks in front of this person, he
3 steps out of the shadows and unloads -- I don't know how many
4 shots -- eight or nine shots. Pretty much he -- he fires the
5 gun until it stops firing, and then he turns around and runs
6 away.

7 And so what the Government is hoping to do is to present
8 all of this evidence to the jury, present expert witnesses
9 saying that firearms are tools of the trade of drug dealers
10 because of precisely the risk of what actually happened to
11 Mr. Hunt on December 2nd -- that he might get shot at.

12 And then in a separate case in this courtroom, the
13 Government is also arguing that part of what the Hoover gang
14 does, including Lorenzo Jones, is to use firearm violence to
15 support their own drug trafficking. I mean, this is precisely
16 what the State's expert is going to testify at this trial as
17 the reason why drug dealers carry firearms.

18 So it's a necessary part of preparing a defense on this
19 case -- to understand whether the reason why Mr. Hunt was shot
20 at on December 2nd was related to drug trafficking or whether
21 it was related to some other thing.

22 It's also exculpatory, potentially, on the 924(c) charge.
23 If, as the Government is taking the position here, the motives
24 for Lorenzo Jones, or whoever it was to shoot and try kill
25 Mr. Hunt, was not related to drug trafficking in any way, then

1 that is -- that could be evidence that the defense could use to
2 argue to the jury that, even if the jury finds that Mr. Hunt
3 possessed firearms, this wasn't related to his alleged drug
4 trafficking, that it was related to something else.

5 THE COURT: And so the other possibility would be
6 they're rival gangs; right?

7 MR. ROBB: Rival gangs. Maybe they have some
8 other -- I mean, the answer to your question, Your Honor, is "I
9 don't know" because the Government has evidence they're not
10 giving me.

11 THE COURT: But how could that even be exculpatory
12 for your client? That's what --

13 MR. ROBB: What the 924(c) case law makes quite clear
14 is to be guilty of 924(c), the defendant's intent in possessing
15 the firearm needs to have been to further his unlawful
16 activities that are otherwise charged. In this case drugs.

17 So in order to reach a conviction on the 924(c), which is
18 the most serious count in this case, the jury will need to find
19 that the Government has proven beyond a reasonable doubt that
20 Mr. Hunt's intent in possessing firearms was to further his
21 activities dealing drugs. And what the -- what the
22 Ninth Circuit has also made clear is that, if the possession of
23 the firearms is not factually related, it just happens to be
24 coincidental to drug -- drug trafficking activity, that that
25 person is not guilty of carrying in furtherance of the drug

1 charge.

2 So if -- so to make another factual point, the Government
3 just will not present any evidence that Mr. Hunt was carrying
4 guns while dealing drugs. There's not really going to be any
5 evidence of Mr. Hunt actually engaging in any drug deals at
6 all. What they hope the entire basis of the 924(c) charge
7 is -- the circumstantial evidence of guns being at the house
8 that he was at, when they served the search warrant, and having
9 a small amount of drugs also at that house.

10 That is the -- that's the -- that's the evidence on the
11 924(c) charge.

12 In their motion to sever, what they are arguing is that,
13 in order to support that inference that Mr. Hunt possessed
14 those firearms in furtherance of his drug dealing, that the
15 jury gets to rely on the evidence from his possession on the --
16 on December 2nd of his possession of the firearms there.

17 Mr. Sax is correct they haven't charged the 924(c) as on
18 December 2nd. They've only charged it at the subsequent date.
19 But what they argued at the motion to suppress and the -- to
20 defeat the motion to sever is that the jury could consider the
21 evidence of his possession on December 2nd to consider whether
22 he's guilty of the 924(c) charge.

23 So what the -- if the defense could argue that the -- as
24 the Government has argued -- I mean -- so I suspect that this
25 is what the evidence shows, that the shooting on December 2nd

1 had nothing to do with any drug dealing activity that Mr. Hunt
2 was also doing at the same time, this is the factual position
3 the Government is taking in this courtroom now. If that's
4 true, that's exculpatory as to the 924(c) charge. And it's a
5 basis to sever the December 2nd count from the remaining counts
6 for that reason.

7 THE COURT: Okay. Thank you, Mr. Robb.

8 Who's arguing? Mr. Sax?

9 MR. SAX: Yeah. Just a few points. I wasn't
10 prepared to address the motion to sever. We can discuss that
11 further at a later date, but just for the Court's benefit,
12 Mr. Hunt's blood was found on the -- one of the guns in the
13 satchel and a gun box, matching one of the guns; was found
14 underneath his bed at the Dekum Street residence, along with a
15 handwritten receipt for one of the guns. So that's one of the
16 reasons why the two events are considered intertwined from the
17 Government's perspective.

18 I'm still having trouble understanding the defense
19 argument about why it's relevant -- the intent of the shooter.
20 Let's say Lorenzo Jones wanted to shoot Dontae Hunt because
21 he's a Sagittarius. Why does that matter? Isn't what matters
22 Dontae Hunt's intent in whether or not he possessed the
23 firearms? And it may or may not be in discovery for the Hoover
24 case why the shooter shot at Dontae Hunt. But at the time he
25 doesn't know what those motivations are. And if he doesn't

1 know it, it seems like it would be completely irrelevant to his
2 behaviors.

3 Also, the elements of felon in possession don't include
4 sort of a defense, other than a narrow necessity self-defense
5 claim, which doesn't really apply here. The intent of the
6 possessor is really irrelevant to Count 4, the felon in
7 possession, other than whether he knowingly possessed firearms.

8 So the intent of the shooter really has no bearing on the
9 Government's ability to establish the elements of felon in
10 possession, which is the crime that relates to the guns that
11 were in the satchel.

12 THE COURT: So it sounds like, Mr. Robb -- again, I
13 understand you're not prepared necessarily to verbatim discuss
14 what happened at the motion for severance, but the -- if I
15 understood correctly, the Government is taking the position
16 now, in this case, not to say, with regard to December 2, 2017,
17 that he's carrying the firearms because he's involved in drug
18 trafficking.

19 MR. SAX: I -- I expect there will be expert
20 testimony about drug dealers carrying guns and why they carry
21 guns, and there will be evidence that he was drug trafficking
22 at that time, but we will not be arguing -- or we will not be
23 adducing evidence that he carried those particular guns on that
24 date in furtherance of drug trafficking. Our focus will be on
25 the guns in the house that were found later.

1 THE COURT: So what about Mr. Robb's argument that,
2 if Mr. Jones was allegedly shooting Mr. Hunt not because of
3 drug trafficking at all, is that exculpatory evidence that the
4 defense should get in this case?

5 MR. SAX: No. Because the -- what matters is what
6 defendant thought, not what the shooter thought. And the
7 defendant's actions can't based on something that was -- you
8 know, if we say -- say there's discovery about the motivations
9 of the shooter. Those weren't available to the defendant when
10 agents executed a search warrant on his house on -- the Dekum
11 Street residence.

12 So I'm still having trouble understanding why the motive
13 of the shooter would be a defense to Dontae Hunt if he doesn't
14 know the motive at the time that the alleged crimes are
15 happening.

16 THE COURT: So what if, for example, the information
17 regarding Mr. Jones shooting Mr. -- allegedly shooting Mr. Hunt
18 on December 2nd showed it was because Mr. Jones is a Hoover and
19 Mr. Hunt is a member of a rival gang and wasn't related to drug
20 trafficking? Then, what about Mr. Robb's point that that is
21 evidence that is potentially exculpatory in the 924(c) count?

22 MR. SAX: He's welcome to adduce evidence about why
23 he did what he did or, "Hey, I thought it was gang
24 retaliation," but the --

25 THE COURT: But yes --

1 MR. SAX: -- but that can come from him.

2 THE COURT: But why should he not be able to get some
3 of the -- I mean, say, for the sake of argument, information
4 discovery supports that that's why Mr. Jones shot at the
5 defendant. Wouldn't that be information the defense should
6 get? And, if not, why not?

7 MR. SAX: The internal motivations of the shooter
8 aren't relevant to the defendant's sort of perceptions. He may
9 have been mistaken. Mr. Hunt may have been mistaken as to the
10 reason for the shooting.

11 THE COURT: Doesn't it bolster the legitimacy of his
12 view that it's "I'm carrying this to protect me from the
13 Hoovers, as opposed to because I'm in a gang -- or because I'm
14 a drug trafficker"?

15 MR. SAX: He's welcome to make that argument in his
16 defense, but I -- I'm still not understanding why the discovery
17 about a separate investigation to a shooter that we're only
18 producing because of the evidentiary value of that surveillance
19 video, still -- still not following why -- why that would be
20 something he gets to view in terms of discovery.

21 THE COURT: Well, defense gets to get information,
22 other information, that's in the hands of the Government about
23 circumstances that might support their theory of the case;
24 right?

25 MR. SAX: If it's material and relevant, yes.

1 THE COURT: Right. So --

2 MR. SAX: So are we in agreement that it's not
3 material or relevant to the 922(g), the felon in possession
4 charge?

5 THE COURT: I think Mr. Robb would say, no, he's not
6 in agreement on that.

7 MR. ROBB: No, not at all.

8 MR. SAX: Is there any case law to support the
9 proposition that the intent -- other than the -- in the narrow
10 necessity self-defense claim, that the intent of the possessor
11 is relevant in a 922(g) case?

12 THE COURT: Well, I think, it -- Mr. Robb, if I
13 understood correctly, made the argument of the -- the relevance
14 argument that the Government is going to put on an expert that
15 says, "Carrying guns is a tool of the drug trafficking trade,"
16 and that then suggests that, then, because there's evidence --
17 presumably, the Government is going to present evidence
18 throughout the trial of Mr. Hunt engaging in drug trafficking.
19 That then goes to his motive to -- certainly, it's -- the
20 inference is it goes to his motive for carrying the guns on
21 December 2 of 2017.

22 So the question is whether that other information about
23 December 17th -- December 2, 2017, is at least information that
24 should be disclosed to the defense. Because it is hard to
25 segregate each of the counts and the motive for each. So

1 what -- obviously, interviews about -- of others, could that be
2 relevant to the circumstances of December 2, 2017?

3 You're actually establishing that there's a relationship
4 between the counts; so that's, you know, as I understand it at
5 least, what Mr. Robb is arguing that's why they should get
6 information about that event. And the information has been
7 discovered in the Rhodes case involving Mr. Jones but not in
8 this case.

9 MR. SAX: I don't quite understand the question.

10 THE COURT: You suggest that nothing about an
11 investigation of December 2nd is relevant or material, but you
12 want to introduce events from that date?

13 MR. SAX: Yes.

14 THE COURT: I guess I'm still -- because you have
15 connected all the charges.

16 MR. SAX: There's evidence from the house that
17 relates to the possession of firearms in the Eugene parking
18 lot.

19 THE COURT: Has there been a review for exculpatory
20 information for Mr. Hunt, by your office, of the evidence in
21 the Lorenzo Jones case? And if so, what kind of review?

22 MR. SAX: I'll have to consult with the AUSAs in that
23 case. I believe we've turned over the materials related to the
24 shooting.

25 And I'm still having trouble understanding. So the

1 argument is, if it was a gang shooting, that that's -- that
2 would be exculpatory because it would provide a motivation for
3 Mr. Hunt to have a gun eight months later?

4 THE COURT: That's what Mr. Robb is arguing.

5 MR. ROBB: He was shot eight months earlier, and now
6 he has a gun. And what the Government needs to argue to the
7 jury on the 924(c) is that the reason he had the gun was not to
8 defend himself against this other person that might come shoot
9 him again -- because I'm not sure that person had been caught
10 by that point -- but that he was doing it to further a drug
11 deal.

12 That's going to be -- that's probably the prime question
13 for this case. Most of Mr. Hunt's -- a great deal of
14 Mr. Hunt's sentencing exposure in this case will turn on
15 precisely that question.

16 THE COURT: Do you want to respond, Mr. Sax?

17 MR. SAX: Let me consult with my co-counsel.

18 THE COURT: Why don't we do this: Since we're still
19 going to -- my inclination is I'm still -- it's likely to be my
20 ruling that the vast majority of the Rhodes discovery is not --
21 defendant hasn't shown the materiality of that discovery, and
22 the Government makes a compelling reason why we should not err
23 on the side of overdisclosure in that case and provide
24 information about a rival gang RICO charge to -- in Mr. Hunt's
25 case -- I find it completely irrelevant to the charges here.

1 Where I'm just trying to make sure is, one, that there's
2 no *Brady* information regarding Mr. Hunt, along the lines that
3 Mr. Robb is suggesting, and, that is, to the extent defense --
4 I don't know if it's very compelling defense, and it may be
5 worse for the defendant than positive for the defendant, but a
6 gang-motivated shooting that may have caused Mr. Hunt to carry
7 a weapon is certainly relevant to the case. The question is,
8 is there some evidence of that, that the -- it might arguably
9 be exculpatory for the 924(c) charge, whether -- that it's in
10 furtherance of protection from a rival gang.

11 Now, again, I don't know why defense can -- can't already
12 make this argument, but it does require them to say that
13 Mr. Hunt is part of a rival gang; so -- and we haven't yet
14 talked about where gang evidence fits in here. But, certainly,
15 defense would be opening up the door to Mr. Hunt's gang
16 affiliations if they go that route. And if they are not going
17 that route, then I would not order any of that discovery.

18 But I think the Government should at least be doing a
19 *Brady* review of the evidence surrounding the December 2, 2017,
20 shooting.

21 MR. SAX: And I just want to get clarification on the
22 contours of that review. That's any motivation -- gang-related
23 or otherwise -- why the shooter might have acted?

24 THE COURT: Anything that would cut against carrying
25 the firearms as part of drug trafficking?

1 Is that -- would you consider that exculpatory, Mr. Robb?

2 MR. ROBB: The reason you carry firearms is to defend
3 yourself or to inflict violence on somebody else, and I think
4 evidence that Mr. Hunt was shot multiple times would give any
5 rational person reason to believe he wanted to possess firearms
6 to defend himself from that happening in the future.

7 And, I mean, the --

8 THE COURT: So you can already present that to a
9 jury. If you wanted to. Again --

10 MR. ROBB: Well, so here's the question: Was this
11 out of the blue? Were there events that precipitated this
12 happening? And were they events that Mr. Hunt was privy to?

13 I mean, the answers to all of these questions, presumably,
14 are found in the material that the Government has, and they're
15 all relevant to answering those. And I think what
16 discoverability turns on is not the defense that the defense
17 chooses to present at the trial, but the defense is allowed to
18 examine all of the evidence that is relevant to alternative
19 defenses. And then after a full and fair chance to review all
20 that evidence, then to decide what evidence to present to the
21 jury at the trial.

22 So regardless of whether or not the defense chooses to
23 assert any alleged gang motive that precipitated the shooting
24 or not, I don't know the answer to that question.

25 But we are permitted to evaluate that and to use the

1 evidence that the Government has that's relevant to that in --
2 in the process of both evaluating that defense, evaluating
3 whether there's any additional investigation follow-up that
4 needs to go on, and to be fully informed to decide how to best
5 defend the case. I mean, that's the underlying principles of
6 all of these rules.

7 THE COURT: Understood. Although the defense for the
8 December 2, 2017, felon in possession charges related to the
9 firearms, presumably, one defense is your client doesn't know
10 what is in that satchel or the guns weren't in the satchel at
11 the time that he's carrying it. So he either didn't carry it
12 or doesn't know what is in it. And other than that -- and that
13 they're somebody else's firearms.

14 So the possession or the ownership of the firearms by
15 somebody else certainly would be exculpatory information. So
16 if any aspect of the investigation from that evening reveals
17 that the guns really belong to someone else, that seems
18 exculpatory, and defense should get it. If it's that somebody
19 else carried those guns to the scene, that is probably
20 something that defense should get. In terms of other defenses,
21 I don't see any other --

22 MR. ROBB: So whether Mr. Hunt knowingly possessed
23 the firearms, I agree, is the issue as to that count. There's
24 evidence that these were either Rylie Jones's firearms or that
25 she at least had enough of a possessory right to those firearms

1 that she was transporting them out of state for purposes of
2 going to the gun range with her dad.

3 And so the question becomes is what evidence is there that
4 Mr. Hunt actually possessed the firearms on that day?

5 And it's circumstantial here. Like, what the -- to
6 convict Mr. Hunt of the possession, what the jury will need to
7 believe is at the time -- is that in that satchel, at the time
8 Mr. Hunt was carrying it, there were, indeed, those two
9 firearms, or at least one of those firearms in that satchel,
10 and that he knew it was in there.

11 What type of circumstantial evidence might make it more or
12 less likely, one, that he put the guns in there or, two, that
13 he was carrying them, knowing that they were in there.

14 Well, if something had just happened slightly before that
15 incident, which makes it more likely that he believed that he
16 might be shot at, that would be relevant to that question.

17 THE COURT: Do you disagree with that?

18 MR. SAX: I don't think the case law supports that.
19 For a strict felon in possession charge, I think they just have
20 the elements. Unless it's a necessity -- or a necessity
21 defense, that the motivations for why someone is carrying or
22 not carrying a gun don't come in.

23 THE COURT: It's not material?

24 MR. SAX: To --

25 THE COURT: I mean, under Rule 16, you're saying that

1 doesn't -- that's not material evidence?

2 MR. SAX: Maybe I'm talking about the elements to
3 prove at trial rather than discovery.

4 THE COURT: Right. You don't have to bring up motive
5 if you don't want to, but it's not the standard for Rule 16.

6 MR. SAX: I still don't understand -- I appreciate
7 the argument of 924(c). I still don't grasp the argument about
8 why someone's motive in -- motive for carrying a gun or not
9 carrying a gun would be relevant as a defense in a felon in
10 possession case.

11 THE COURT: All right. So I -- I think, if there is
12 evidence in the -- or information relating to Mr. Hunt's motive
13 for carrying the firearms, that seems, to me, to be material.

14 So I would ask the Government to make sure that the -- or
15 to do some kind of review of the information obtained. To the
16 extent it's all separate, I assume you would already know if
17 there's information relating to the Hunt investigation that
18 came up in the Rhodes investigation.

19 MR. SAX: One of the issues is a lot of the -- I'm
20 told a lot of the Hoover RICO discovery is information from
21 cooperators. So it's going to be real swamped, in terms of
22 figuring out -- it just comes from very sensitive sources that
23 the Government is going to be very reluctant to identify.

24 THE COURT: All right. Let's do -- do we have a
25 date -- we have now briefing dates set for the confidential

1 informant motion; right?

2 MR. SAX: Yes.

3 THE COURT: When are we hearing that motion?

4 MR. SAX: We haven't set a date. That also gets to
5 the issue of the trial date, and Mr. Robb and I can --

6 THE COURT: Yeah, I do want to talk about the trial
7 date.

8 I don't know if the confidential informant motion overlaps
9 with some of the issues about December 2, 2017. Does it at
10 all, or not?

11 MR. ROBB: No.

12 MR. SAX: I don't think so.

13 THE COURT: Okay. I'm going to think about the -- I
14 think I understand what the defense is arguing for the
15 December 2nd -- or the information from the Rhodes case. I
16 want to think about that.

17 I want the Government to at least -- I just would hate for
18 this to come down, and you haven't done any kind of *Brady*
19 review of the evidence from December 17th -- excuse me --
20 December 2, 2017, in the Rhodes case when it relates to the
21 same incident where he's shot. So I want to make sure there's
22 no *Brady* information in that that would go to any of the
23 defenses that the defense might have in this case.

24 So I don't know how best you can accomplish that.

25 MR. SAX: Just, hypothetically, let's say the

1 shooter's motivation is retaliation. Is that -- are we
2 potentially turning over information about the shooter's
3 motives or just about what you said earlier about information
4 as to Mr. Hunt's motive for carrying a gun?

5 THE COURT: It would presumably be what Mr. Hunt
6 would be aware of at the time.

7 So anything that goes to Mr. Hunt's motive to carry the
8 firearm or not on December 2, 2017; and I'm not inclined to
9 provide a bunch of information about or give the defense access
10 to cooperator information. So I want the Government to think
11 about whether there's -- I want at least a review of
12 information that might go to what Mr. Hunt knew at the time he
13 walked across that parking lot on December 2, 2017, that might
14 either implicate somebody else in the firearms that he's
15 carrying or provide a motive for Mr. Hunt to carry a firearm
16 because he knew that he was under attack, for example.

17 So is that something that the Government can figure out
18 how to accomplish?

19 MR. SAX: We can look into it. I foresee some
20 pushback about the cooperator issue. Because I believe some of
21 this information is coming from cooperators. So we'll likely
22 have to revisit this after the Government has explored the
23 contents.

24 THE COURT: Okay. Let me -- then we have the
25 briefing schedule. Let's talk about the continuance because I

1 can decide these motions quickly. So both the motion to
2 suppress the iPhone and the information on at least -- even if
3 I were to allow the defense any of the information that they
4 seek with regard to the Rhodes case -- which I'm not saying I'm
5 going to -- I just -- even if I'm persuaded that some limited
6 information should be disclosed, that could happen very quickly
7 because it would be quite limited.

8 In terms of -- I know we're not today litigating the issue
9 of whether there are *Brady* violations in connection with the
10 case, and I know the Government wanted time to brief that and
11 asked me to have briefing by April 22nd -- which I agreed with
12 them to do -- I did want the speedy trial issue resolved, as I
13 mentioned, and is the Government going to be prepared to give me a
14 brief on that by Friday?

15 MR. SAX: Your Honor, I have spoken with Mr. Robb.
16 We ask to have until Monday, if that's okay with the Court, and
17 the defense is not opposed.

18 THE COURT: Okay. Again, I want to decide that
19 because I'm trying not to push the trial date because, as
20 Mr. Hunt knows, when we were back here with Mr. Warren a long
21 time ago, I really wanted this case to go, and I know you did,
22 and obviously back -- you've already tried -- started this case
23 once.

24 THE DEFENDANT: Uh-huh.

25 THE COURT: I'm trying to get this case to trial

1 May 10th.

2 I understand that there's been a lot of additional
3 discovery provided at this time. Is the Government -- I'm
4 trying to understand the Government's position because it said
5 "unopposed motion for a continuance." Is it the Government's
6 position that I should grant a continuance by the defense at
7 this time?

8 MR. SAX: Yes. The Government -- I think everyone
9 only wants to try this case once. And given the current
10 landscape -- and I've spoken with Mr. Robb, and he can address
11 this as well -- I think the prudent move here is -- we
12 recognize this case is very old. Mr. Hunt has been in custody
13 the whole time. But given all the moving parts, the Government
14 supports defense's motion for a continuance.

15 THE COURT: Is there a reason for the delay in
16 getting this discovery?

17 MR. SAX: The Government will address that in its
18 briefing.

19 THE COURT: Okay.

20 And, Mr. Hunt, are you in favor of a further delay in this
21 the case?

22 MR. ROBB: In -- I think we did file the written
23 waiver for Mr. Hunt that kind of stakes out the defense's --
24 the defense's position. We were ready to go to trial on
25 May 10th but for the discovery disclosures that happened

1 recently. And one of the other things that I realized in
2 assessing that was that a motion for -- to suppress and for a
3 *Franks* hearing on one of the key search warrants in this case
4 had been litigated before the provision of material that I
5 think is relevant and helpful for the defense in that motion.

6 So given that circumstance and the circumstance of the
7 discovery material that was recently -- that was recently
8 given, I just don't feel I can do a constitutionally adequate
9 job of analyzing everything and being ready for everything by
10 May 10th, given the recent material that was provided.

11 That being said, we have asked for alternative remedies
12 before that, and we would hold to that.

13 So if the Court were to -- I mean, obviously, the remedy
14 of dismissal would solve that problem, and Your Honor can think
15 about that; but if the Court were to exclude any evidence that
16 would turn on further review of the material I just received
17 from the -- from the Government's case, we would be happy to go
18 out on May 10th.

19 THE COURT: Is it possible to let me know what kind
20 of information it was?

21 MR. ROBB: So there's a few things that have
22 happened, and I still don't have one of the reports. So the --
23 a bulk of emails were provided in regards to two of the
24 Government witnesses, between Mr. Hunt and them, and it's
25 thousands of -- thousands of pages. And being able to

1 adequately have time to review all of that correspondence and
2 decide whether it's relevant and whether it changes defense
3 strategies or strategies to cross-examine those witnesses, is
4 something that we need to do. We were ready to proceed to
5 trial and to cross-examine those witnesses prior to those --
6 seeing those emails.

7 There's an issue -- I've also received a lot of discovery
8 in Mr. Hunt's other case. I think the Government is going to
9 be taking the position that there might be some overlap of
10 that. I did a quick review, and I didn't see any overlap of
11 that. But the discovery in that case is vast, and I have -- I
12 did, I think, my due diligence to try to look through that and
13 see what might be relevant in this case and review it in the
14 context of this case. But I -- I could not find the same batch
15 of emails that were given to me recently in that other batch.
16 I have not looked at them yet.

17 The second thing is in regards to the Alexander
18 Olivo-Alzheimer material and how he is involved in this case.
19 The only evidence of Mr. Hunt ever purchasing counterfeit
20 oxycodone pills, which is the key of the mandatory minimum drug
21 charge in this case, is a single text message correspondence
22 with Mr. Olivo-Alzheimer from Mr. Hunt's phone.

23 I was aware of that and had looked at that and looked at a
24 little bit of what the discovery materials of
25 Mr. Olivo-Alzheimer were; and sort of reading between the lines

1 on a few things, I realized there was a whole just trove of
2 other information that the Government had about this person.
3 They proceeded on their own separate investigation of him that
4 became a very mature one that involved search warrants and
5 things like that.

6 So one of the things I need to do is to fully examine --
7 since he's the only known source of supply in the Government's
8 case and in this case, I need the opportunity to really look
9 into him in a thorough way, including reviewing his phone,
10 which is quite large; reading other witness reports about what
11 he was doing; and to do a follow-up investigation based on that
12 and talk to other witnesses and things like that.

13 And the reason for that is because the evidence appears to
14 suggest that Mr. Olivo-Alzheimer was not transacting with
15 Mr. Hunt for counterfeit oxycodone pills, as the Government
16 will use that for. I think the evidence strongly suggests that
17 it was not for those types of pills.

18 So adequately being able to deal with that text message
19 correspondence will involve reviewing tens of thousands of
20 pages of materials from that case.

21 So that's sort of the second thing.

22 The third thing is there's a new witness that was not part
23 of the original case that the Government still has not provided
24 me a copy of the interview report for. I've read it. I have
25 taken notes on it, but the -- it was a new disclosure that

1 happened very recently, and I think there might be some
2 follow-up investigation and things that -- the defense will
3 need to do that. And having the -- having the interview
4 report, which I still don't have, will be part of that.

5 And so all of this is a long way of saying that a month
6 ago I think we were ready to go. Actually, no, because I have
7 been requesting some of these things for longer than a month
8 ago. Before I realized there was not a lot more materials out
9 there that was relevant to defending the case, we were ready to
10 go. Now that I both am aware that there's more materials and
11 actually have them, I'm going to need some more -- we're going
12 to need more time to look at them in order to be ready.

13 And we're asking -- because of the age of the case, we're
14 asking for remedies other than more time; but if Your Honor
15 doesn't grant those remedies, we were asking for more time.

16 THE COURT: All right. Let me ask the Government.
17 Is this -- again, we'll have the -- set a hearing for the *Brady*
18 violation, but is this discovery that the defense is entitled
19 to have that you think they should get more time to analyze
20 before we go to trial?

21 MR. SAX: Yes. I think that would be prudent.

22 THE COURT: Okay. All right. What I want you all to
23 do is to confer on a trial -- actually a few different
24 suggested trial dates and let -- again, I guess, Mr. Hunt, this
25 is going to require me to set the trial date over in order to

1 have your lawyer adequately prepared. Are you in agreement
2 with that?

3 If you're not, we're just going to make a go.

4 THE DEFENDANT: No. I'm looking about if you don't
5 grant the other remedies. I want you to look at the other
6 remedies.

7 THE COURT: No, I understand that.

8 THE DEFENDANT: I want you to look at the other
9 remedies. I think he cued in on forgetting another part of --

10 THE COURT: Yeah, I haven't -- that part -- I haven't
11 ruled on that motion yet.

12 THE DEFENDANT: Yeah, yeah, yeah, yeah, yeah.

13 THE COURT: But what I want to make sure is that you
14 all know whether you're going to trial in two weeks. Is there
15 any scenario by which we would be going to trial in two weeks,
16 such as the Government not using evidence? I mean, other than
17 me dismissing the case, is there any other scenario by which we
18 could go to trial May 10th?

19 MR. SAX: I don't think so. I think -- in terms of
20 making a good record, I think we want to take our time on this.

21 THE COURT: Okay. So what I want to do is at least
22 have a trial date set. And that doesn't mean I'm not going to
23 rule on your motion, but if there's either --

24 Because I don't think, Mr. Robb, you're asking me to
25 exclude evidence. You say you need more time to review this

1 information.

2 MR. ROBB: No. One of the remedies is to exclude
3 witness testimony and other aspects of the case that are
4 relevant to the new material. I think that my -- the two -- if
5 Your Honor grants that, I think the Government may not be able
6 to proceed with the case. So I think we're kind of back in the
7 same position.

8 But, no, I've made a motion to dismiss and, in the first
9 alternative, to exclude the Government from using evidence that
10 I would need to review this new material for; and if we don't
11 have to deal with that evidence at trial, we're happying to go
12 to trial on May 10th.

13 THE COURT: What is that evidence?

14 MR. ROBB: So there's one witness that I forgot to
15 mention. So one of the Government's -- one of the Government's
16 primary cooperators was engaged in additional drug trafficking
17 that -- as she was cooperating. I just got those recently; so
18 we would be moving to exclude her as a witness. We would be
19 moving to exclude the text message correspondence between
20 Mr. Olivo-Alzheimer and Mr. Hunt and moving to exclude -- I
21 think I -- this is my motion, but sort of other --

22 THE COURT: Yeah.

23 MR. ROBB: -- other -- moving to exclude the
24 testimony of Etrece Brazzle, PR Suebsang, the Olivo-Alzheimer
25 text messages; and because of the issues with the -- with the

1 timing of the discovery and related to the motion to suppress
2 timing, I would also be moving to exclude evidence related to
3 that motion, but that is sort of -- I think the primary
4 exclusion would be PR Suebsang, Etrece Brazzle, and
5 Rylie Jones.

6 I wasn't prepared to address this, but I address this in
7 writing in my motion.

8 THE COURT: All right. I'm assuming the Government
9 would rather have me continue the case than --

10 MR. SAX: We really need to be able to brief and
11 address the motion to dismiss. And then after that, I think
12 the dust will settle, and we will have a better sense of sort
13 of where we're at.

14 THE COURT: Okay. So if --

15 Jake, do we have a date that we could set for the motions?

16 Maybe I can rule just on the briefing, but I'm not sure
17 about that. I probably should give each of you a chance to
18 have some argument on the motion to dismiss and the other
19 discovery issues.

20 DEPUTY COURTROOM CLERK: So if Government's response
21 is going to be due Monday, do you want a chance to reply for
22 the --

23 MR. SAX: There's two different briefs. There's the
24 motion to dismiss for speedy trial. The Government is going to
25 respond on Monday. And then the other motion to dismiss is the

1 Government's going to respond on the 22nd.

2 DEPUTY COURTROOM CLERK: 22nd.

3 And if there's any reply, I don't know, but --

4 THE COURT: Then we're already in May.

5 The first week in May? Could we do it the Friday of the
6 first week of May?

7 DEPUTY COURTROOM CLERK: That's when we have our
8 pretrial conference in the case.

9 THE COURT: Is there a reason we can't push this case
10 potentially just another two weeks?

11 DEPUTY COURTROOM CLERK: Millegan, possibly.

12 THE COURT: Millegan is not until June.

13 DEPUTY COURTROOM CLERK: Yeah, that's June 6th.

14 THE COURT: Mr. Robb, you had some sort of conflict;
15 right?

16 MR. ROBB: I have two trials in Douglas County on
17 June -- or excuse me -- May 25th and 26th and then June 1st and
18 2nd.

19 THE COURT: I'm sorry. Can you give me the dates
20 again?

21 MR. ROBB: Yeah. May 25th and 26th and June 1st and
22 2nd.

23 THE DEFENDANT: Ms. Immergut, can I say something?

24 THE COURT: Ask your lawyer first if he wants you
25 to tell me.

1 THE DEFENDANT: It ain't nothing like that. I'm on
2 medication. I'm on water pills. Can I use the restroom?

3 THE COURT: Okay. You gotta go. Okay.

4 THE DEFENDANT: Can I use the restroom, please?

5 THE COURT: Yeah, yeah.

6 Do you mind, Mr. Hunt, if we talk about calendar?

7 THE DEFENDANT: Yes, ma'am, you can.

8 (Mr. Hunt leaves the courtroom.)

9 THE COURT: So when you all discussed this, did you
10 come up with potential dates?

11 MR. ROBB: We came up with October 10th.

12 MR. SAX: We're assuming you're not available August
13 and September.

14 THE COURT: How about early July?

15 MR. ROBB: My first child is due currently July 1st;
16 so I'm trying to keep at least the two months open in case
17 there's some medical reasons I can't be locked up in trial.

18 THE COURT: Congratulations.

19 MR. ROBB: Thank you.

20 THE COURT: All right. Why don't I -- well, I do
21 want to make sure that we have a clear record of Mr. Hunt
22 agreeing to the continuance. I know it's a little bit -- what
23 I can do is maybe keep the current trial date now. When he
24 comes back -- I mean, I do want him -- it's a conditional
25 waiver. Obviously, if I don't dismiss the case, then it sounds

1 like everyone is in agreement that it would be -- all right.

2 (Mr. Hunt returns to the courtroom.)

3 THE COURT: Mr. Hunt, so this is where we're at in
4 terms of scheduling: I'm going to keep the current trial date
5 and have the lawyers give me some new proposed dates for trial.

6 THE DEFENDANT: Yes, ma'am.

7 THE COURT: I am going to still consider -- we're
8 going to have a hearing on your other motions, let's say,
9 May --

10 Jake, when do you want to have them then? May -- is it at
11 the end of that May --

12 DEPUTY COURTROOM CLERK: So --

13 THE COURT: Our pretrial conference date.

14 DEPUTY COURTROOM CLERK: That's the 6th.

15 THE COURT: So May 6th can we have a hearing on all
16 these other motions? Because you're already supposed to be
17 with me. Okay? And I think the briefing should be done by
18 now.

19 So I do -- in the meantime, I do want the Government to be
20 considering -- I haven't yet ruled on the issues raised in the
21 Jones case. Again, I would -- I want to consider whether very
22 limited information and whether the Ninth Circuit would think
23 that very limited information should be disclosed to the
24 defense. I am mindful of the sensitivity of the information
25 that you've been talking about, and I may need a better record

1 of that in order -- if I am going to deny the motion, but I
2 want to make sure that we don't find out later that there's
3 some *Brady* information in there.

4 Again, looking at it from the defense's perspective.

5 Mr. Hunt, I need to know from you that knowing -- I mean,
6 we can go to trial on May 10th. Your lawyer is telling me he
7 thinks it's in your best interest to be able to review all of
8 this new material.

9 THE DEFENDANT: Yes, ma'am.

10 THE COURT: And I need to know that you're -- again,
11 if I don't dismiss your case, that you are on board with
12 setting the case out further.

13 THE DEFENDANT: Yeah.

14 THE COURT: Are you?

15 MR. ROBB: I think pursuant to the written waiver,
16 you would consent to that time?

17 THE DEFENDANT: Yeah.

18 THE COURT: Because I would find -- again, I'm going
19 to analyze whether there has been a speedy trial violation
20 already. They filed a motion; but, obviously, you're now --
21 you would be asking for more time in order to do further
22 investigation that your lawyers think is in your best interest.

23 THE DEFENDANT: More time based on, like, 60 days or
24 70 days?

25 THE COURT: Well, the difficulty is there -- you've

1 got four lawyers here, each of who has different -- they have
2 different things going on.

3 THE DEFENDANT: Yeah.

4 THE COURT: It's possible, if I can -- I mean, I
5 don't mind asking the Millegan lawyers potentially -- I just
6 don't know how many witnesses they have subpoenaed -- that's
7 set for June -- it's a two-week period in June -- to -- because
8 Mr. Hunt is in custody, to see if there's some wiggle room with
9 that case. That's also an old case.

10 But it would depend, really, on how it affects their
11 witnesses, since you would already be moving witnesses; but
12 that's another -- what are our dates for Millegan?

13 DEPUTY COURTROOM CLERK: June 6th for the trial.

14 THE COURT: June 6th is when trial starts in that
15 case and I --

16 DEPUTY COURTROOM CLERK: June 7th. Tuesday. Sorry.
17 I carved out two weeks for that.

18 So if that -- I know that conflicts with some of the
19 things you have, Mr. Robb; but with the difficulty of moving
20 this --

21 MR. ROBB: I think I could do a June 6th or 7th
22 trial.

23 Oh, but apparently Ms. Thibeault is telling me she's out
24 of state that period of time.

25 THE COURT: Okay. That whole week or --

1 MS. THIBEAULT: I am out of state until June 7th, and
2 then I have another trial scheduled to go the 8th. I'm happy
3 to -- most of my cases are out of Washington County Circuit
4 Court. I'm happy to, you know, look at that and talk to my
5 presiding judge out there about the situation here. I just
6 can't guarantee that that would become available right at this
7 juncture. I'm happy to brainstorm ways to figure it out,
8 but --

9 THE COURT: So let's -- yeah, so I'm going to need to
10 talk to -- if that works -- otherwise, for the Government,
11 presumably, you might have to check with some of your
12 witnesses. But that's an -- I want to use that as a possible
13 date, if you can do it, and then I want you to get to trial. I
14 wanted to try to advance your case before with Mr. Warren.

15 THE DEFENDANT: Yes, ma'am.

16 THE COURT: And he wasn't able to do it.

17 So I know we've been talking about this as soon as
18 Mr. Robb got on the case. I know you want to go to trial, and
19 I want you to go to trial; so -- but are you willing to waive
20 your right to speedy trial to allow from here on to whatever
21 date the lawyers can come up with that works with everyone's
22 schedules? But it could be -- we're talking about --
23 potentially October, Mr. Robb is suggesting.

24 MR. ROBB: Mr. Hunt, you would agree to that
25 conditional -- on the conditions that you put into your written

1 waiver. Is that true?

2 THE DEFENDANT: Yeah.

3 THE COURT: Okay. And that was --

4 MR. ROBB: It was conditional on the alternative
5 remedies not being granted.

6 THE COURT: Correct. Yeah. So I'm still going to
7 consider those, but I want to make sure that we have the
8 possibility of a new date too because that's what all the
9 lawyers are telling me would be in your best interest.

10 THE DEFENDANT: Can I ask my lawyer a quick question,
11 please?

12 THE COURT: Sure.

13 THE DEFENDANT: So, yeah, I agree to it -- about
14 having another trial date.

15 THE COURT: Okay.

16 THE DEFENDANT: I agree. I'm not opposed to it.

17 MS. THIBEAULT: What we have just expressed to
18 Mr. Hunt is that the defense, first and foremost, is asking for
19 a dismissal, then exclusion of evidence, and then exclusion of
20 witnesses; and only should Your Honor deny all three of those
21 requests, that, then, conditional upon that denial, Mr. Hunt
22 would waive, and that -- I believe I -- we have laid that out
23 in the written waiver.

24 THE COURT: Right.

25 THE DEFENDANT: Yes, ma'am.

1 THE COURT: Okay. So understood.

2 So I do find that the defendant has freely and voluntarily
3 consented to a conditional waiver, should we need to change the
4 trial date, and I do want the parties -- I would find that that
5 time period is excludable so that counsel can be adequately
6 prepared for trial. Again, assuming all the evidence is going
7 to come in and I'm not going to otherwise dismiss the case
8 based on the other motions that are pending.

9 MR. ROBB: Sorry. Just for the record, one more
10 clarification: I mean, one of our alternative arguments is
11 that that time should not be excluded for purposes of the
12 Speedy Trial Act. One of our arguments for the speedy trial
13 motion is that this -- because it's essentially
14 Government-caused, this time is also countable against the
15 Government for purposes of that; but if Your Honor doesn't
16 agree with us on that, we would be -- so it's another -- I
17 mean, it's another layer.

18 I just want to make sure the record is clear so that, when
19 we're arguing this later, it's -- it -- we -- you didn't think
20 that we had already waived that.

21 THE COURT: All right. Understood. So whether --

22 MR. ROBB: A bunch of different layers.

23 THE COURT: So I think I have to decide
24 those other -- so far we have excludable time up and through
25 the current trial date; so I'll not make a determination today

1 as to whether or not the trial or the time -- any time that
2 would be needed to continue the case in order to deal with the
3 additional discovery is excludable or not. It depends really
4 on what is presented at the motions on that. So far, we are in
5 excludable time and the pending motions, but -- and there
6 continue to be pending motions, at least through the current
7 trial date, because I already ordered that the last time.

8 All right. So we have a date for the next -- for
9 briefing.

10 Anything else I need to deal with today, Mr. Sax or
11 Mr. Sussman?

12 MR. SAX: Just a little guidance. Do we have a
13 placeholder trial date? I know we have a lot of witnesses.
14 Some of them need to fly, and we want to get it on their
15 calendar as soon as possible.

16 THE COURT: So we currently have the May 10th, but I
17 want you to confer with counsel and come up with at least two
18 possible alternative trial dates, and I urge you to figure out
19 whether the June date is a possibility, and I'm going to do the
20 same, from my end, to see if the lawyers have some flexibility
21 in that case with their witnesses; but, otherwise, I -- because
22 I also want Mr. Hunt to know what are the potential changes.
23 Otherwise, we'll -- you're going to have to -- if it turns out
24 that we don't have a date that is acceptable, then I'm just
25 going to have to say we're going to trial on a particular date.

1 I know that, as I looked through the docket, as I looked
2 at all the continuances, it seemed that the length of trial
3 continued to increase a little bit from the beginning estimate
4 to the final estimate, which I think the most recent was seven
5 days. But is that consistent with where we're at now, Mr. Sax?

6 MR. SAX: From the Government's perspective, giving a
7 day or two for the defense, I think that's reasonable.

8 THE COURT: So that includes a day or two for the
9 defense?

10 MR. SAX: Yes.

11 THE COURT: Mr. Robb, what is your best assessment?

12 MR. ROBB: I think seven. I think seven days total
13 is fair. I think I had put on my own calendar ten days, just
14 because things go long and I didn't want to schedule other
15 things; but, you know --

16 THE COURT: So I think -- at this stage, I think I do
17 need to at least vacate the current pretrial document filings
18 because I think they are due next week.

19 MR. ROBB: On Tuesday.

20 THE COURT: And I assume that is what everybody wants
21 me to do.

22 MR. SAX: Yes.

23 MR. ROBB: Please.

24 THE COURT: Now, I think, there were several --
25 obviously, the Government had prior submissions in the last

1 case, as did the defense. Should I assume that everything will
2 be different now or not necessarily or -- from the Government's
3 perspective?

4 MR. SAX: I think it's like a house. We put, you
5 know, one more story on it. So there's a little bit more
6 information but a lot of the same stuff.

7 THE COURT: Okay. And I assume with new lawyers it
8 may be completely different.

9 MR. ROBB: (Nodding head.)

10 THE COURT: So those dates will be vacated. I'm not
11 yet vacating the May 10th date, however, until I have new dates
12 to put the trial. And then I will have ruled on -- but I want
13 to know from you, by email to Jake, what your possible dates
14 you can do and when witnesses will be available, and include
15 the June date in there; but, otherwise, give me as many options
16 as you can.

17 All right. Anything else I need to -- and then I'm going
18 to follow up with a ruling on the motion to suppress that we
19 heard today, and I'll -- I think I can also rule on the Jones
20 information, but I do want to get some -- I may wait on that
21 just until we get the -- you can assume that anything not
22 related to December 12th I'm -- 2017 in the Rhodes
23 investigation/Jones investigation, that I don't find is
24 material here. But I want to hear about just the *Brady* issues,
25 anything related to December 12th.

1 MR. SAX: I think it's December 2nd.

2 THE COURT: December 2nd. Excuse me.

3 MR. SAX: But you're referring to events that may
4 have precipitated the event on December 2nd?

5 THE COURT: Correct. Correct.

6 MR. SAX: Okay.

7 THE COURT: I think I may rule some -- I don't know.
8 I'm going to look at that. If I can rule on the entirety, I
9 will; but I may carve out a little piece to get more
10 information about it.

11 All right. Anything else you need to hear from me today?

12 MR. SAX: Not from the Government. Thank you.

13 THE COURT: Okay. Then we'll be in recess. Thank
14 you.

15 MR. ROBB: Thank you, Your Honor.

16 (Hearing concluded.)

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

United States of America v. Dontae Lamont Hunt

3:18-cr-00475-IM

Motion Hearing

April 13, 2022

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 7/26/2022
CSR Expiration Date: 9/30/2023